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Title: Oregon Department of Fish anc Wildlife, et al., Petitioners
v.
Klamath Indian Tribe

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Mountain Jr.,James E.

Counsel for respondent: Miller,Don B.

Entry	Date	Note	Proceedings and Orders
1	Jun 25 1984	G	Petition for writ of certiorari filed.
2	Jul 30 1984		Brief of respondent Klamath Indian Tribe in opposition filed.
3	Aug 1 1984		DISTRIBUTED. September 24, 1984
5	Oct 1 1984		REDISTRIBUTED. October 5, 1984
6	Oct 9 1984		Petition GRANTED.
			**********
7	Nov 23 1984		Brief of petitioner OR Dept. of Fish & Wildlife filed.
8	Nov 23 1984		Joint appendix filed.
9	Dec 28 1984		Brief of respondent Klamath Indian Tribe filed.
10	Dec 31 1984		Record filed.
11	Dec 31 1984		Record filed.
12	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 27, 1985. (2nd case.)
13	Jan 10 1985		CIRCULATED.
14	Feb 19 1985	X	Reply brief of petitioner OR Dept. of Fish & Wilclife filed.
15	Feb 27 1985		ARGUED.

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No. 83-_____

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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49 pp

QUESTION PRESENTED

May a state regulate hunting, fishing and trapping on former Indian reservation lands ceded by an Indian tribe to the federal government under the following circumstances:

(1) a treaty had reserved to the Tribe the right to hunt, fish and trap exclusive of state regulation as to lands "included in the reservation;"

(2) the cession agreement provided as to the ceded lands that the tribal members "do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to" the ceded lands; and

(3) neither the cession agreement nor the circumstance surrounding its execution clearly indicated that Congress intended to restore to the tribal members their exclusive right to hunt, fish and trap on the ceded lands?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Klamath Indian Tribe (respondent herein); The Oregon Department of Fish and Wildlife; John Donaldson, individually and as Director of Oregon Department of Fish and Wildlife; The Oregon Fish and Wildlife Commission; Don Barth, John Boyer, Kenneth Klarquist, R. Gene Morris, Herbert Lundy, Fred A. Phillips, II, Jack Steiwer, each individually and as a member of the Oregon Fish and Wildlife Commission; John C. Williams, individually and as Superintendent of the Oregon State Police; Major Sterling Norton, individually and as Head of Fish and Game Division of the Oregon State Police, (petitioners herein).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Oregon Department of Fish and Wildlife, et al. (hereinafter "the state") respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife, et al.*, No. 83-360 (March 27, 1984).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984), and is attached to this petition as Appendix A. The opinion of the district court is unreported, and is attached as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on March 27, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

STATUTES AND TREATIES INVOLVED

This case involves two acts of Congress. The first is the Treaty of October 14, 1864, 16 Stat. 707 (1866), in which the Klamath and Modoc Tribes, along with the Yahooskin Band of Snake Indians, ceded to the United States approximately 20

million acres of aboriginal lands and received in exchange a reservation comprising approximately 1.9 million acres. This treaty is set forth in full in Appendix C to this petition. The second is the Act of June 21, 1906, 34 Stat. 366, in which Congress ratified a cession agreement with the Klamath Indians providing for the Tribe's cession of 621,824 acres to the United States in exchange for $533,270. This Act is set forth in full in Appendix D to this petition.

STATEMENT OF THE CASE

By the Treaty of October 4, 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded "all their right, title and claim" in approxin.ately 20 million acres of aboriginal lands in exchange for a reservation of approximately 1.9 million acres. This land "until otherwise directed by the President of the United States," was to "be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation." (Stipulation of the Parties filed in the district court, hereinafter referred as "Stip.", Exhibit A). Pursuant to the terms of the treaty, the Klamath Tribe members agreed and bound

> "themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes."

Id.

The treaty further provided that the Indians would have the exclusive right to occupy the reservation and that no white persons were to remain on the reservation:

> "It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; *and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . .*"

Id. (emphasis added).

In 1871, the United States government surveyed the reservation's exterior boundaries. (Stip., ¶ 2). The survey erroneously excluded a larger amount of land from the reservation boundaries because the natural boundaries referred to in the 1864 Treaty were not followed where they did not conform to township subdivision surveys. *Id.* In the years following 1871, tribal members complained because they believed land had been erroneously excluded from the reservation. (Stip., ¶ 3). Congress responded to the tribal complaints in 1896 by authorizing the appointment of the Klamath Boundary Commission to determine the number of acres excluded from the reservation and the value thereof. (Stip., ¶ 4). The commission interviewed tribal members who had been signatories to the 1864 Treaty. Many of these members testified they were convinced the excluded land was intended to be within the reservation boundaries because they had informed the Indian agent who negotiated the treaty that they wanted the land because of its hunting, fishing and gathering value. (Stip., Ex. D). The commission's report was transmit-

ted to the 54th Congress by the Secretary of the Interior, who noted in his transmittal letter

> "the Commissioners find the area of lands which have been excluded from the reservation by the erroneous surveys of its outboundaries to be 617,490 acres, and determine the value of these excluded lands to be $533,270.
>
> "The report in question has been carefully examined by the Commissioner of Indian Affairs, as shown by the accompanying communication dated 25th instant, who states that in his opinion a portion of the funds due the Indians should be made available for irrigation purposes for the benefit of the Indian allottees and the schools, . . . and the remainder of the sum recommended by the Commission to be paid . . . be expended under the direction of the Secretary of the Interior in the drainage and irrigation of lands, and in the purchase of cattle, wagons, mowing machines, and agricultural implements, the erection of houses, and for such other purposes as he may deem for the benefit of the Indians.
>
> "The Commissioner submits an item for insertion in the Indian appropriation bill now pending, prepared in accordance with the above recommendations, and I have the honor to recommend that the matter receive early and favorable consideration by the Congress."

(Stip., Ex. D). The Boundary Commission Report mentioned that the character of the excluded area varied greatly, and that

> "[w]ith the exception of the meadows of the Sycan and Sprague River sections, which are the principal bone of contention, the greater part of the excluded land consists of rocky and sterile mountain ranges, producing very ordinary timber and little grass.
>
> ". . . .

> "Giving these inferior tracts, the good timber land and the meadows of the Sycan and Sprague River valleys their proportionate valuation, we determine the value of the excluded land to be $533,270, or 617,490 acres at 86.36 cents per acre."

Id. After lengthy negotiations with the Klamath Indians, and subsequent surveys which revealed that 621,824 acres had been erroneously excluded, the United States entered into a cession agreement with the Klamath Indians on June 17, 1901, with respect to the erroneously excluded lands. (Stip., ¶¶ 7-11). This agreement was ratified by Congress in 1906. (Stip., ¶ 13).

Article I of the Act of 1906 provided that the Klamath Indians

> "*do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation* lying between the boundaries described in the [1864] treaty . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres."

(Stip., Ex. B, emphasis added).

Article II provided for the payment to the Klamath Indians of $537,007.20:

> "In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full [sic] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one . . . ."

Id.

Article III specified the manner of payment to the Indians of the $537,007.20. Article IV provided:

> "It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement."

Id.

Virtually all of the land ceded by the Klamath Tribe was closed to entry and placed in either national forests or parks. (Stip., ¶ 14).

Since passage of the Act of 1906, tribal members have continued to hunt, fish and trap on the excluded lands without regard for state laws or regulations. (Stip., ¶ 20). The parties below agreed that although the State of Oregon generally asserted its jurisdiction over tribal members when they were hunting, fishing and trapping outside the reservation boundaries, the parties were unaware of any assertion by the state or denial by the Tribe of state jurisdiction over Indian hunting and fishing specifically with regard to the lands ceded in the 1906 Act. (Stip., ¶¶ 21-22).

On March 16, 1982 plaintiff Klamath Indian Tribe filed an action in the District Court for the District of Oregon pursuant to 28 U.S.C. § 1331, seeking to enjoin defendant Oregon state agencies from interfering with tribal members' hunting, fishing and trapping of wildlife on certain lands, and for declaration of their rights with respect thereto. At issue, specifically, was the State of Oregon's authority to extend its fish and game laws to two areas of land: (1) lands outside the exterior boundaries of the Klamath Indian reservation as

those boundaries existed at the time of termination of the Tribe in 1954, which lands had been ceded by the Tribe in 1906 to the United States (the ceded lands); and (2) lands within the boundaries of the reservation at the time of the 1954 termination, refered to as "C & O lands." The defendants conceded they had no authority to exert jurisdiction over the C & O lands.

On cross-motions for summary judgment, the district court granted judgment in favor of plaintiff Tribe and, declared that the Act of June 21, 1906, 34 Stat. 366, did not abrogate the treaty rights of the Klamath Indian Tribe to hunt, fish, and trap free from state regulation on lands ceded to the federal government under the 1906 Act. The State of Oregon appealed the district court's judgment to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291.

The Ninth Circuit affirmed the judgment of the district court. The court of appeals reasoned:

(1) The ceded lands were originally intended to be included in the Treaty of 1864 but were excluded by an erroneous survey that did not diminish the reservation's boundaries.

(2) The treaty rights to hunt, fish and trap were "not appurtenant to the Tribe's property interest in the former reservation land itself" but existed "apart from ownership of the land." 729 F.2d at 612.

(3) Under a provision of the 1906 Act securing to the Indians "all benefits under existing treaties not inconsistent with the Act," the treaty-reserved rights to hunt, fish and trap

survived because they were not inconsistent with the 1906 Act.

(4) Because the treaty-reserved rights to hunt, fish and trap were not inconsistent with the cession agreement, "the Tribe's treaty rights may be abrogated only by a showing of clear congressional intent." 729 F.2d at 612.

(5) The face of the 1906 Act, the surrounding circumstances and legislative history show no clear congressional intent to abrogate the treaty reserved rights to hunt, fish and trap on lands included in the reservation.

With respect to this latter point the Ninth Circuit emphasized that the 1906 Act nowhere mentioned hunting, fishing and trapping rights. The court also stressed the fact that the Indians were not compensated for loss of hunting, fishing and trapping rights in the Cession Agreement as being indicative of congressional intent not to abrogate those rights.

REASONS FOR ALLOWANCE OF WRIT

The Ninth Circuit employed fallacious reasoning to reach the erroneous conclusion that the State of Oregon lacks the authority to regulate hunting, fishing and trapping on former Indian reservation lands which were removed from the reservation by a cession agreement voluntarily executed by the Klamath Indians and the United States. The Ninth Circuit ignored a fundamental principle of Indian treaty law that a diminishment of reservation boundaries necessarily entails a diminishment of Indian hunting, fishing and trapping rights, unless Congress affirmatively manifests its intent to grant these rights on the diminished land back to the Indians. The lower court's disregard of this fundamental principle is contrary to the rationale, if not the rule, of decisions of this Court in the area of Indian treaty law. Moreover, the issue presented has significance beyond this particular case, because the Ninth Circuit's erroneous resolution of the issue conflicts with the Eighth Circuit's resolution of the same issue.

A. In concluding that the Klamath Tribe retained hunting, fishing and trapping rights on the ceded land, the Ninth Circuit failed to appreciate or assess the legal significance of the fact that the Cession Agreement ratified by Congress in 1906 diminished the boundaries of the Klamath Indian Reservation.

The state argued below that under a prior decision of the Ninth Circuit[1] the Indians' right to hunt, fish, trap and gather on lands within the reservation, exclusive of state regulation was premised on the Indians' right of occupancy of the lands and the language of the 1864 Treaty granting the Indians "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds and berries within its limits." Citing this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the state further argued that the terms of the 1906 Act, "do hereby cede, surrender, grant, and convey to the United States

[1] In *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), the Ninth Circuit, relying upon *Menominee Tribe v. United States*, 391 U.S. 404 (1968), held that the 1864 Treaty with the Klamath Tribe contained a reservation of hunting, fishing and trapping rights which were not abrogated by the 1954 Klamath Termination Act as to lands within the boundaries of the reservation at the time of termination of federal supervision over the Tribe.

all their claim, right, title, and interest in and to" the ceded land, had the clear effect of diminishing the boundaries of the reservation as established in the 1864 Treaty by deleting the ceded land from the reservation boundaries. The state then made the basic point that the 1906 Act necessarily had the effect of abrogating the Indians' treaty reserved rights in the ceded land. This point necessarily follows because the land had been removed from the boundaries of the reservation, and because the Indians' only entitlement to hunt, fish, trap and gather on the lands free of state regulation was based on inclusion of the land within the boundaries of the reservation. The Ninth Circuit either missed or ignored this point.

In its written opinion the Ninth Circuit did not even mention the fact that the 1906 Act diminished the reservation's boundaries, even though the Klamath Tribe conceded this fact in its brief below. The lower court evidently bypassed the state's argument, based on *DeCoteau v. District County Court*, *supra*; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (1980), *cert. den.*, 449 U.S. 905 (8th Cir. 1980), that as a result of the diminishment of reservation boundaries tribal members lost their rights to hunt, fish, trap and gather exclusive of state regulation on the lands removed from the reservation boundaries, absent congressional action to restore those rights. The Ninth Circuit discussed neither these cases nor the impact of

diminishment of reservation boundaries on the outcome of this case.[2]

All the decisions of this Court, from *Seymour v. Superintendent*, 368 U.S. 351 (1962), through the recent decision in *Solem v. Bartlett*, ___ U.S. ___, 104 S.Ct. 1161 (1984), have commenced with resolution of the fundamental question: Did Congress intend to disestablish or diminish reservation boundaries in passing the act giving rise to the controversy in the case? When this Court has found that disestablishment or diminishment has occurred, state regulation of the area disestablished or removed from the reservation, when at issue, has been upheld.[3] *DeCoteau v. District County Court*. Moreover, where this Court has not upheld state regulation of the area in question, it has reached this conclusion because the area had not been removed from the reservation boundaries. *See Seymour v. Superintendent*, *supra*; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Solem v. Bartlett*, *supra*.

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[2] The Ninth Circuit did cite *Rosebud Sioux Tribe v. Kneip*, *supra*, as authority for the proposition that the court was "obliged to examine the face of the 1906 Act, the surrounding circumstances, and the legislative history" for any indication of clear congressional intent to abrogate the Tribe's treaty rights, inasmuch as the right to hunt, fish and trap on the ceded lands was not, in the court's view, inconsistent with the cession agreement. 729 F.2d at 612.

[3] In *Rosebud Sioux Tribe v. Kneip*, *supra*, this Court found that certain congressional acts clearly evidenced congressional intent to diminish the boundaries of the Rosebud Sioux Reservation, notwithstanding language in all of the acts providing that "nothing in this 'agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." 430 U.S. at 623 (Justice Marshall, dissenting). This language is identical to language in the 1906 Act upon which the court below relied in concluding the treaty reserved rights in the ceded land survived the cession agreement.

Thus, the Ninth Circuit committed a fundamental error when it failed to address the impact of diminishment of the reservation's boundaries by the Act of 1906, the fact of which was not even in dispute between the parties. Because of this error, the Ninth Circuit reached an improper conclusion and wrongly deprived the state of the authority to regulate hunting, fishing and trapping on 621,000 acres of prime wilderness area.

B. The Ninth Circuit's decision squarely conflicts with the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*, in which the court of appeals correctly held that two cession agreements which diminished reservation boundaries abrogated treaty reserved rights to hunt, fish and trap exclusive of state regulation on the ceded lands.

The Ninth Circuit erroneously declined to follow the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*, a case virtually on all fours with the present matter. In *Red Lake Band*, the Eighth Circuit affirmed the district court's "well reasoned decision" (614 F.2d 1162) that the Band gave up its rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities, on lands which it agreed to cede to the federal government in 1889 and 1904. The district court held that by the terms of two cession agreements, which provided that the Band "agreed to 'grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to' " the

ceded land, the Band had relinquished all rights to hunt, fish and trap on the ceded land. *United States v. State of Minnesota*, 466 F. Supp. 1382 (U.S. Dist. Ct., Minn., 1979), *aff'd sub nom*, *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*. The district court aptly had noted that the language used in the cession agreements was "nearly identical" to that contained in *Rosebud Sioux Tribe v. Kneip*, *supra*, and *DeCoteau v. District County Court*, *supra*, wherein this Court made "clear that the . . . language is 'precisely suited' for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands," including the Band's rights to hunt, fish, and trap. *United States v. State of Minnesota*, 466 F. Supp. at 1385.

The district court opinion adopted by the Eighth Circuit in *Red Lake Band* did not end its analysis with its determination that the language, "grant, cede, relinquish, and convey . . . all our right, title, and interest in and to" the ceded land, resulted in the Band's relinquishment of its hunting, fishing and trapping rights in the ceded land. The court further analyzed the cession agreements and the circumstances surrounding their execution to determine whether Congress had granted *back* to the Band hunting, fishing and trapping rights in exchange for the ceded land. The court found no congressional intent to grant back to the Band hunting, fishing and trapping rights on the ceded land, and correctly concluded that abrogation of those rights had resulted from the cession acts in question.

The Ninth Circuit not only declined to follow the analysis of the Eighth Circuit in *Red Lake Band*, it failed to discuss or

distinguish the prior federal decision in its opinion or to indicate why it may have concluded that the decision was wrong. The Ninth Circuit's opinion in the present case is squarely in conflict with the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota, supra*, and this Court should grant certiorari to resolve the conflict between the circuits.

CONCLUSION

At issue in the present case is the state's power to regulate hunting, fishing and trapping on approximately 621,000 acres, or 970 square miles of former reservation land. The Ninth Circuit's decision incorrectly deprives the state of regulatory authority over this large tract. The decision is fundamentally flawed and in conflict with a prior decision of another circuit. For these reasons, this Court should grant the petition for certiorari to review the significant issue presented and reverse the judgment of the court below.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff-Appellee,	)	NO. 83-3660
	)	
v.	)	DC NO. 82-367-SO
	)	
THE OREGON DEPARTMENT OF FISH AND WILDLIFE, et al.,	)	OPINION
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
District of Oregon
Gus J. Solomon, District Judge Presiding
Argued and Submitted: January 6, 1984

Before: KILKENNY, WALLACE and CANBY, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant Oregon Department of Fish and Wildlife appeals from part of the district court's grant of summary judgment in favor of the Klamath Indian Tribe. The court held, in part, that the Tribe, and not the state, has the right to regulate tribal members' hunting, fishing and trapping on lands ceded to the United States in 1901. We affirm.

FACTS

In 1864, the Klamath and Modoc Tribes, along with the Yahooskin Band of Snake Indians, ceded to the United States roughly 20 million acres of aboriginal lands. In return, they

received a 1.9 million acre reservation. Treaty of October 4, 1864, 16 Stat. 707 (1866). A portion of the treaty provided:

> [T]he following described tract . . . shall, . . . be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation. . . . [T]he exclusive right of taking fish in the streams and lakes, included in said reservation, . . . is hereby secured to the Indians . . . .

Government surveyors twice surveyed the reservation boundaries, once in 1871 and again in 1888. Both surveys failed to include large tracts of land concededly intended for the reservation. Following years of tribal complaints, Congress authorized a commission to determine the amount and value of the excluded land. In 1896 the commission concluded that 617,000 acres were erroneously excluded, and that the land was worth $553,270, or 86.36 cents per acre. This figure was based on soil quality, grazing lands, timber, and the quantity of rock formation. Tribal members' hunting, fishing and trapping rights were not mentioned.

In 1901 the Bureau of Indian Affairs negotiated an agreement withe [*sic*] the Tribe for cession of the excluded lands at the rate of 86.36 cents per acre. The agreement relied on a survey accepted by the General Land Office that show 621,824 acres excluded. The agreement provided in part:

> [N]othing in this agreement shall be construed to deprive the [Tribe] of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

Congress ratified the agreement in 1906. Act of June 21, 1906, 34 Stat. 366. Virtually all ceded lands were immediately closed to entry and placed in national forests or parks.

In 1969 the Indian Claims Commission awarded the Tribe over four million dollars for the ceded lands because of the inconscionable consideration originally paid the Tribe. The ICC did not mention tribal members' hunting, fishing and trapping rights in its calculations. *Klamath & Modoc Tribes v. United States*, 20 Ind. Cl. Comm. 522, 525-26 (1969).

The parties agree that the state has no authority to regulate Indian hunting, fishing and trapping on reservation lands. They also agree that these activities were essential to the Tribe's survival when the 1864 Treaty was executed and remain a significant part of the tribal lifestyle today. Tribal members have continued to hunt, fish and trap on the ceded lands from 1906 to the present, without regard for state laws and regulations.

This court has held that under the same treaty, tribal members who elected to withdraw from the Tribe pursuant to the Klamath Termination Act of 1954 nevertheless retained treaty rights to hunt, fish and trap on former reservation lands. *Kimball v. Callahan*, 493 F.2d 564 (CA9), *cert. denied*, 419 U.S. 1019 (1974) (*Kimball I*); *Kimball v. Callahan*, 590 F.2d 768 (CA9), *cert. denied*, 444 U.S. 826 (1979) (*Kimball II*). The lands in *Kimball I* and *II* constituted national forest land and that private land on which hunting, trapping or fishing was permitted. 493 F.2d at 569-70.

The Tribe filed this action to enjoin Oregon state agencies and officials from interfering with tribal members who hunt, fish or trap on the ceded lands.

ISSUE

Whether the Klamath tribal members retained hunting, fishing and trapping rights on lands ceded to the United States in 1901, so that they may exercise those rights free of state regulation.

STANDARD OF REVIEW

No genuine issues of material fact are present. Accordingly, this court must determine whether the district court's decision was erroneous as a matter of law. *California ex rel. Younger v. Tahoe Reg. Planning Agency*, 516 F.2d 215, 217 (CA9), *cert. denied*, 423 U.S. 868 (1975).

DISCUSSION

A treaty is a grant of rights from the Indians to the grantee. It is not, as suggested by appellant, a grant of rights to the Indians. All rights not granted are reserved to the Indians and these rights are to every individual Indian as though named in the instrument of transfer. *United States v. Winans*, 198 U.S. 371, 381 (1905). The reserved rights impose a servitude on every piece of land as though specifically described therein. *Winans, Id.* A tribe retains all rights not expressly ceded in the treaty so long as the rights are consistent with the tribe's sovereign status. *United States v. Adair*, 723 F.2d 1394, 1413 (CA9 1983).

Indian treaties should be construed as the tribes would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S.

620, 631 (1970), and they are broadly interpreted in the Indian's favor. *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 676.

Here, the Tribe seeks the right to regulate its tribal members' hunting, fishing and trapping activities, free of state interference. It does not claim that its members may conduct those activities on private land, absent consent of the landowner. *See Antione v. Washington*, 420 U.S. 194, 207 n.11 (1975). Simply stated, we must first determine whether the 1864 Treaty reserved for the Tribe the right to hunt, fish and trap on the ceded lands.

The Tribe relies on this court's decisions in *Kimball I*, and *II*. The court in *Kimball I* held that tribal members who withdrew from the tribe pursuant to the Klamath Termination Act still retained the right to hunt, fish and trap on former reservation lands. *Kimball I* relied on *Menominee Tribe v. United States*, 391 U.S. 404 (1968), where the Court held that treaty language included the right to hunt and fish, *even though the treaty made no mention of hunting and fishing rights*. The court in *Kimball I* noted that the Tribe enjoyed the exclusive rights to those activities for nearly 100 years with the consent and acquiesence [*sic*] of the state; that courts have a duty to construe treaties favorably to Indians; and that it was unlikely that the Tribe would have knowingly relinquished hunting and fishing rights when they entered into the treaty. *Kimball I*, 493 F.2d at 566.

The state argues initially that *Kimball I* and *Menominee* are distinguishable. The essence of its argument is twofold —

one, because the ceded lands were never a part of the reservation the treaty does not apply to them and two, hunting, fishing and trapping rights are appurtenant to occupancy rights, and therefore when the Tribe ceded its property rights it also gave up its right to hunt, fish and trap on the ceded lands.

Neither argument is sound. First, the Tribe and the government understood the treaty to include the land erroneously excluded. Survey errors cannot diminish a reservation's boundaries. *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (CA9 1980). The subsequent cession agreement itself served to compensate the Tribe for the land erroneously excluded, but made no mention of hunting, fishing and trapping rights.

Second, treaty rights to hunt and fish are not appurtenant to the Tribe's property interest in the former reservation land itself. The fact that such rights may continue to exist apart from ownership of the land was reaffirmed in *Kimball II*, 590 F.2d at 772-73. Other courts have also upheld retention of treaty rights to hunt and fish despite loss of possessory title. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 823 (CA8 1983), *cert. denied*, 104 S.Ct. 707 (1984); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 352 (CA7), *cert. denied*, 104 S.Ct. 53 (1983). *See also United States v. Adair*, 723 F.2d at 1412 (Klamath Termination Act did not abrogate tribal water rights as reserved in 1864 Treaty).

Article IV of the cession agreement states that the Tribe is entitled to all benefits under existing treaties not inconsistent

with the agreement. Treaty rights to hunt, fish and trap are not inconsistent with the agreement. The agreement provided for payment to the Tribe at a rate of 83.36 cents per acre, however neither the Boundary Commission Report nor the cession agreement mentioned compensation for the Indian's hunting, fishing and trapping rights. These rights are valuable property rights, and abrogation by Congress gives rise to a claim for compensation under the fifth amendment. COHEN, HANDBOOK OF INDIAN LAW, at 468 (1982). *See Menominee Tribe*, 391 U.S. at 413. *See also Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Whitefoot v. United States*, 293 F.2d 658, 659 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); 13 Stat. 324 (1864). ($5,000 paid for off-reservation hunting and fishing rights). The United States converted substantially all of the ceded lands into national forests or parks immediately following execution of the cession agreement. Clearly, use of those lands as forests or parks is not diminished by exercise of the right to hunt, fish and trap on those lands. *See Lower Brule*, 711 F.2d at 817-18.

Having decided that the right to hunt, fish and trap on the ceded lands is not inconsistent with the cession agreement, the Tribe's treaty rights may be abrogated only by a showing of clear congressional intent. In this context, we are obliged to examine the face of the 1906 Act, the surrounding circumstances, and the legislative history. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). The State argues that examination of these factors shows clear congressional intent to abrogate treaty rights. We cannot agree.

Again, we reemphasize that nowhere in the 1906 Act are hunting, fishing and trapping rights mentioned. The state asserts that retention of treaty rights is contrary to the Tribe's agrarian progress and the dominent purpose of the Act, to convert the Indians into an agricultural people. The purpose of the Act, as shown by the pre-treaty negotiations and the congressional history, was to settle a boundary dispute while continuing to honor the Tribe's treaty rights. In fact, only a small part of the ceded lands was usable for agricultural purposes, and was far better suited for hunting, fishing and trapping.

The United States acts in one of two capacities when dealing with the Indians, either as trustee or as sovereign, in exercise of its powers of eminent domain, *United States v. Sioux Nation*, 448 U.S. 371, 408-09 (1980). Federal executive officials must exercise due care in administration of Indian property; they cannot as a result of a negligent survey give tribal lands or rights to others or appropriate them to their own purposes. *See United States v. Creek Nation*, 295 U.S. 103, 109-10; COHEN, at 226, 486. In this case, the United States acted as trustee in executing the cession agreement. *See C & O Land Co. v. Rankin*, 87 Fed. 532, 533 (D. Or. 1898). An interpretation of the Act as abrogating hunting and fishing rights would be wholly inconsistent with the government's trustee status. The failure to compensate the Tribe for those rights further evidences a lack of congressional intent to abrogate the Tribe's rights.

Finally, the legislative history demonstrates that the Interior Department and the Tribe understood that the treaty rights extended to the land described in the treaty, including the land erroneously excluded. The Tribe insisted upon inclusion of those lands when the treaty was signed, and complained for years until a boundary commission was established to correct the boundary errors.

Congress has the ability to directly express its intent regarding imposition of state law. *See Bryan v. Itasca County*, 426 U.S. 373, 389 & n.15 (1976). The state has not shown the clear congressional intent required to abrogate the Tribe's treaty rights. *See Kimball I*, 493 F.2d at 569.

In sum, the Tribe and its members retained their treaty rights to hunt, fish and trap on the ceded lands. It follows that those rights may be exercised free of usual state regulation. *See Kimball I*, 493 F.2d at 566.

CONCLUSION

The judgment of the district court is hereby AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 82-367-SO
	)	
THE OREGON DEPARTMENT OF FISH AND WILDLIFE; et al.,	)	OPINION
	)	
	)	
Defendants.	)	
	)	

[Names of counsel omitted in printing]

SOLOMON, Judge:

The Klamath Indian Tribe (Tribe) filed this action to enjoin Oregon State agencies and officials from interfering with Tribe members who hunt, fish, or trap wildlife within the boundaries of their reservation. Both parties have moved for summary judgment.

The facts are undisputed. In 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians by treaty ceded about twenty million acres of land in exchange for a reservation comprising 1.9 million acres. Treaty with the Klamath, etc., Oct. 4, 1864, 16 Stat. 707 (1866). The tribes agreed to "cede to the United States all their right, title, and claim to all the country" outside certain boundaries defined by geographical landmarks. The treaty guaranteed the Tribes

"the exclusive right of taking fish in the streams and lakes, included in the reservation."

In 1871 government surveyor Mercer surveyed the reservation boundaries; he erroneously excluded much land from the reservation. In 1888 surveyor William Thiel resurveyed the reservation; he too excluded much land.

After years of tribal complaints about white settlers on reservation land, the government authorized a commission to determine the amount of land erroneously excluded, and to determine its value. In 1896 the commission determined that 617,000 acres had been erroneously excluded,[1/] and that the land was worth 86.36 cents per acre, or $533,270. Klamath Boundary Commission Report, S. Rep. No. 93, 59th Cong., 2d Sess. (1897). This figure was based on soil quality, grazing land, timber, and the quantity of rock formations, but not the Tribe's hunting, fishing, and trapping rights.

The Bureau of Indian Affairs (BIA) negotiated an agreement with the Tribe for cession of the excluded lands for payment at a rate of 86.36 cents per acre. The agreement provided that the Tribe would "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation" that had been erroneously excluded by the earlier surveys. The agreement also provided that

> [N]othing in this agreement shall be construed to deprive the [Tribe] of any benefits to which they are

> entitled under existing treaties not inconsistent with the provisions of this agreement.

The agreement was ratified by Congress in 1906. Act of June 21, 1906, 34 Stat. 367.

Almost all of the ceded land was immediately closed to entry and placed in national forests or parks.

In 1969 the Indian Claims Commission (ICC) awarded the Tribe $4,152.992.80 as compensation for the inadequate consideration which the United States paid the Tribe for the land ceded under the 1906 agreement. In arriving at this figure, the ICC did not consider the value of the Tribe's hunting, fishing, and trapping rights. *Klamath and Modoc Tribes, etc. v. United States*, 20 Ind. Cl. Comm. 522, 540-43 (Docket No. 100-A, May 14, 1969).

Both parties agree that the State of Oregon has no authority to regulate Indian hunting, fishing, and trapping on reservation lands. The parties also agree that hunting, fishing, gathering, and trapping were essential to the Tribe's survival when the 1864 treaty was executed, and that these activities still constitute a significant part of the Tribal lifestyle. Members of the Tribe have continued to hunt, fish, and trap on the excluded lands from the 1906 cession to the present, without regard to state laws and regulations.

The Tribe contends that *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) permits the Tribe to hunt, fish, and trap free of state regulation. *Kimball* held that the act which terminated the Klamath Indian Reservation in 1954 did not affect the treaty rights of each Tribe member to hunt, fish, and trap on the lands which were part of the reservation. This action

involves the same parties as *Kimball*. However, the purpose of the Cession Act involved here is different from the Termination Act involved in *Kimball*. The Termination Act extinguished a relationship between the Tribe and the federal government, but the Cession Act removed lands from the Klamath Reservation.

Cession treaties and agreements must be interpreted as the Indians understood them, and doubtful expressions must be resolved in favor of the Indians. *Washington v. Washington Fishing Vessel Association*, 443 U.S. 658, 676 (1979); *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1298 (9th Cir. 1981), *cert. granted*, ___ U.S. ___(1982). In *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), the Supreme Court stated:

> [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." [citations omitted]

The Tribe contends that the Cession Act did not abrogate any hunting, fishing, or trapping rights because (1) the agreement expresses an intent to preserve, not limit, treaty rights, and (2) Congress did not clearly express an intent to limit treaty rights. The Tribe also contends that the wildlife was not considered in determining the compensation due it. The

Tribe argues that its loss of interests in tribal property does not entail a loss of treaty rights.

The Defendants contend that the ceded lands are no longer part of the reservation because the Cession Agreement diminished the reservation boundaries.

Defendants rely on *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Rosebud Sioux Indian Tribe ceded land to the Government for sale to settlers, with proceeds going to the Rosebud Tribe as they were received. The Court held that the acts which authorized the sale showed that Congress intended to diminish the boundaries of the reservation.

Defendants contend that *Rosebud* allows the state to exercise jurisdiction over all ceded lands, except those lands which remain within the reservation. In my view, the Defendants read *Rosebud* too broadly. The *Rosebud* Court relied heavily on the legislative history of the cession acts, which indicated that the Rosebud Indians used only a small section of the reservation. For many years the state exercised undisputed jurisdiction over the ceded lands. Here, in contrast, the parties agree that the Tribe members have continuously hunted, fished, and trapped on the excluded lands.

Defendants also contend that because the cession language in the 1864 treaty is similar to the language in the 1906 Cession Act, the two documents should be given the same effect; both abrogate hunting, fishing, and trapping rights over the ceded lands. This construction is much too narrow, and is contrary to the rule that treaties and agreements with the Indians must be construed as the Indians understood them, and in light of the peculiar history and circumstances which

surround the agreement. Furthermore, there is an important difference between the 1864 treaty and the 1906 Cession Act: the Cession Act provides that the agreement shall not deprive the Tribe of "benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."

Even if the 1906 Cession Act diminished the boundaries of the Reservation, the Tribe was not compensated for the hunting, fishing, and trapping rights on the excluded lands. Congress in the past has paid other tribes for destruction or impairment of similar rights, *see* 13 Stat. 324 (1864) ($5,000 compensation for off-reservation hunting and fishing rights); *Whitefoot v. United States*, 293 F.2d 658, 660 (9th Cir. 1961), *cert. denied* 369 U.S. 818 (1962) ($15 million for loss of fishing privileges caused by dam construction). Congress' failure to compensate the Tribe here for loss of hunting, fishing, and trapping rights indicates that Congress did not intend to extinguish those rights.

One purpose of the 1864 treaty was to provide a reservation that would enable the Tribe to remain self-sufficient. The government's use of the ceded reservation lands for wildlife refuge and national forest purposes are consistent with the

Tribe's claim to hunting, fishing, and trapping rights. *See United States v. Adair*, 478 F. Supp. 336, 345, 346 n.5 (D. Or. 1979). I hold that there was no clear Congressional intent to extinguish the Tribe's hunting, fishing, and trapping rights in the ceded land, and that these rights were not terminated.

The Tribe's motion for summary judgment is granted, and Defendants' motion for summary judgment is denied.

DATED this 30th day of December, 1982.

[Signature omitted in printing]

FOOTNOTE

1/ In 1900, the Bureau of Indian Affairs revised this estimate upward to 621,824 acres of land which were erroneously excluded.

APPENDIX C

TREATY WITH THE KLAMATH, ETC., 1864

Articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the fourteenth day of October, A.D. one thousand eight-hundred and sixty-four, by J.W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chief and head-men of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit, La-Lake, Chil-o-que-nas, Kellogue, Moghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poo-saksult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tucktee, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Mukhas, Herman-koos-mam, chiefs and head-men of the Klamaths; Schon-chin, Stat-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and head-men of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE 1. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty fourth parellel of north latitude crosses the summit of the Cascade Mountains; thence following the main dividing-ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud Rivers from the waters on the north; thence along said dividing-ridge in an easterly direction

to the southern end of Goose Lake; thence northeasterly to the northern end of Harney Lake, thence due north to the forty-fourth parellel of north latitude; thence west to the place of beginning: *Provided*, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath Lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's River; thence following up said eastern shore to the mouth of Wood River; thence up Wood River to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath Lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's River is intersected by the Ish-tish-ea-wax Creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary

leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also*, That the right of way for public roads and railroads across said reservation is reserved to citizens of the United States.

ARTICLE 2. In consideration of, and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money thereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of

said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE 3. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employés.

ARTICLE 4. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter,

blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE 5. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two schoolteachers.

ARTICLE 6. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article 1 to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy,

sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE 7. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE 8. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE 9. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the Government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE 10. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE 11. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE 12. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

[Signatures omitted in printing]

APPENDIX D

ACT OF JUNE 21, 1906

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various tribes, and in full compensation for all offices the salaries for which are specially provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, namely:

. . . .

OREGON

For support and civilization of the Klamath, Modocs, and other Indians of the Klamath Agency, Oregon, including pay of employees, five thousand dollars.

For support and civilization of the conferated tribes and bands under Warm Springs Agency, and for pay of employees, four thousand dollars.

For support and civilization of the Walla Walla, Cayuse, and Umatilla tribes, Oregon, including pay of employees three thousand dollars.

Whereas James McLaughlin, an Indian inspector for and on behalf of the Secretary of the Interior, under and by virtue of an Act of Congress approved July first, eighteen hundred and ninety-eight (Thirtieth United

States Statute Laws, page five hundred and seventy-one), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," did, on the seventeenth day of June, nineteen hundred and one, make and conclude an agreement with the Klamath and Modoc tribes and Yahooskin band of Snake Indians, residing on the Klamath Indian Reservation, in the State of Oregon, which agreement is as follows:

This agreement, made and entered into on the seventeenth day of June, nineteen hundred and one, by and between James McLaughlin, U.S. Indian inspector, on the part of the United States, and the Klamath and Modoc tribes and Yahooskin band of Snake Indians, belonging to the Klamath Indian Agency, in the State of Oregon, witnesseth:

ARTICLE I. The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four, and proclaims February seventeenth, eighteen hundred

and seventy, as confirmed by the Klamath boundary commission in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six, and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one, the United States stipulates and agrees to pay to and expend for said Indians, in the manner hereinafter provided, the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents ($537.007.20), being at the rate of eighty-six and 36/100 (.86 36/100) cents per acre, the price awarded for said lands by the Klamath boundary commissioners in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six.

ARTICLE III. It is agreed that of the amount to be paid to the said Klamath and other Indians, as stipulated in Article II of this agreement, the sum of twenty-five thousand dollars shall be paid in cash pro rata, share and

share alike, to each man, woman, and child belonging to said Klamath, and other tribes and under the jurisdiction of the Klamath Indian Agency, within one hundred and fifty days from and after the date of ratification of this agreement, and the sum of three hundred and fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of five per centum per annum, which interest shall be paid to said Indians annually per capita in cash, and that the remainder of said sum of five hundred and thirty-seven thousand and seven dollars and twenty cents, after the payment of the legal fees of attorneys having duly approved contracts, shall be expended for the benefit of said Indians, under the direction of the Secretary of the Interior, upon requisition of the Indians through the U.S. Indian Agent, in the drainage and irrigation of their lands, and the purchase of stock cattle for issue to said Indians, and for such other purposes of stock cattle for issue to said Indians, and for such other purposes as may, in his opinion best promote their welfare: *Provided*, That beneficiaries whose allotments will not be benefited by the irrigation systems constructed under this provision shall not bear any of the expense of such irrigation construction, and shall, as nearly as practicable, receive an equivalent in value of the stock cattle or other articles herein contemplated, that each beneficiary may thus receive his or her proportionate share of the benefits of this provision: *And*

provided further, That in addition to the interest on the fund deposited in the U.S. Treasury, the Secretary of the Interior may, in his discretion, expend for the benefit of said Indians, including reasonable cash payments per capita, not to exceed ten per centum per annum of the principal fund, upon a majority of the male adult Indians of Klamath Agency petitioning for same through the Commissioner of Indian Affairs.

ARTICLE IV. It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

ARTICLE V. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin, and by a majority of the male adult Indians, parties thereto, and when approved by the Secretary of the Interior and accepted and ratified by the Congress of the United States.

For the purpose of carrying into effect the foregoing agreement the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the said agreement is hereby ratified and confirmed. Of the said sum so appropriated, three hundred and fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of

said Indians and the remainder shall be expended as provided in the third article of said agreement.

That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior; and in order to facilitate such exchange and the development of the lands to be so taken thereunder there may also be selected in like manner and as part of the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may

prescribe thereunder. When such exchange is effected patents for the lands so selected and approved shall issue therefor.

SALEM SCHOOL

For support and education of six hundred Indian pupils at the Indian school, Salem, Oregon, one hundred thousand two hundred dollars;

For pay of superintendent at said school, two thousand dollars;

For general repairs and improvements, including construction of viaduct, five thousand dollars;

For bakery and equipment, four thousand dollars;

For general incidental expenses of the Indian Service in Oregon, including traveling expenses of agents, and support and civilization of Indians of Grande Ronde and Siletz agencies, three thousand dollars;

Pay of employees at the same agencies, three thousand dollars;

In all, six thousand dollars.

Office - Supreme Court, U.S.
FILED
JUL 30 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 83-2148

In The

Supreme Court of the United States

October Term, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,
Petitioners,

v.

KLAMATH INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a 1901 Cession Agreement between the Klamath Indian Tribe and the United States, which did not mention treaty hunting and fishing rights but provided expressly that treaty rights "not inconsistent with the provisions of this agreement" would be preserved, nonetheless had the effect of extinguishing tribal treaty rights to hunt, fish, trap and gather free of state regulation on the ceded lands.

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No. 83-2148

In The
Supreme Court of the United States
October Term, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,
Petitioners,

v.

KLAMATH INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts are undisputed. The 1864 Treaty between the United States and the Tribe described a reservation 621,000 acres larger than that subsequently laid out by the government surveyors. After congressional investigation, it was determined that the excluded lands should be ceded by the Tribe to the United States. Neither the resulting 1901 Cession Agreement, nor the 1906 Act of Congress ratifying it, mentioned hunting and fishing rights. Act of June 21, 1906, 34 Stat. 367.

The historical record demonstrates that the excluded lands had initially been included in the reservation at the

Indians' insistence precisely because of their hunting and fishing value to the Tribe. The congressional investigative commission relied heavily on this fact in determining that the lands had indeed been mistakenly excluded from the survey boundaries and that, therefore, they were in fact within the original Treaty Reservation. At the time of the cession the lands were almost completely unsettled, and upon cession were immediately placed in National Parks or Forests and have remained in that status to the present.

The purpose of the Cession Agreement was to honor treaty rights by correcting a government mistake, and the Cession Agreement contains a section specifically preserving consistent treaty rights. The Tribe was not compensated for the taking of its treaty hunting and fishing rights.[1] Tribal members have continued, from aboriginal times through the present, to hunt and fish on the ceded lands without regard to state regulation.

Both courts below found that the 1901 Cession Agreement did not abrogate tribal treaty rights to hunt and fish free of state regulation. They reasoned that, in the absence of a clear indication of congressional intent to extinguish, the tribal rights survive.

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[1]The Report of the Klamath Boundary Commission itemized the factors on which the appraised per acre value was based. It included soil quality, amount and quality of meadow and grazing lands, and amount and value of timber but made no mention of hunting or fishing rights.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Opinion is Founded Squarely Upon Fundamental Principles of Indian Law.

The opinion below simply applied canons of construction that have been consistently reaffirmed by this Court for more than a century, *i.e.*, important Indian rights may not be extinguished by implication, and ambiguities in statutes ratifying agreements between the United States and Tribes must be resolved in the Indians' favor.[2]

The Ninth Circuit's holding relies primarily on this Court's ruling in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), as well as two earlier Ninth Circuit opinions upholding the Klamath Tribe's rights, under the same 1864 Treaty, to hunt and fish free of state regulation on

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[2]See, e.g., United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 353 (1941) ("clear and plain" statement of intent required to support asserted taking of aboriginal lands); Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (Ambiguities in act must be resolved in favor of tribe, as they would have understood); Washington v. Fishing Vessel Ass'n., 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . ."); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973) (Congressional intention to terminate reservation status must be expressed on face of act or be clear from surrounding circumstances or legislative history); Bryan v. Itasca County, 426 U.S. 373 (1976) (Express statement by Congress required to affect tribal immunity from state tax jurisdiction); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (Tribal sovereign immunity from suit unaffected "in the absence . . . of any unequivocal expression of contrary legislative intent"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, (1982) (Clear indication of congressional intent required to support an implicit repeal of tribe's taxing power); Solem v. Bartlett, — U.S. —, 79 L.Ed.2d 443 (1984) (Congress must clearly evince intent to change boundaries before diminishment will be found).

a different portion of the same 1864 Treaty Reservation. *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (*Kimball I*), and *Kimball v. Callahan,* 590 F.2d 768 (9th Cir.), *cert. denied,* 444 U.S. 826 (1979) (*Kimball II*).

In *Menominee Tribe,* this Court held that the 1954 Menominee Termination Act, 25 U.S.C. § 891, *et seq.,* did not extinguish Indian treaty rights to hunt and fish free of state regulation, despite the fact that the Act made no mention of preserving those rights and further provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens. . . ." 25 U.S.C. § 899. The *Menominee* Court looked to the overall purpose of the Termination Act, *i.e.,* to settle the government's financial obligations to the Tribe, and held that a construction which resulted in extinguishment of a compensable property right would be inconsistent with this overall purpose. 391 U.S. at 413. The Court refused to allow the general application of state law to work a "backhanded" abrogation of specific treaty rights[3] to hunt and fish free of state regulation, evoking the oft-affirmed principle that treaty rights may only be extinguished through a clear and unequivocal statement of congressional intent. 391 U.S. at 412-13.

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[3]While the Menominee Treaty contained no explicit reservation of hunting and fishing rights, the Court there held that the language confirming the Reservation, "for a home, to be held as Indian lands are held," encompassed the right to hunt and fish. 391 U.S. at 406. The 1864 Klamath Treaty contains express language preserving fishing rights, which the Ninth Circuit in *Kimball I, supra,* held to encompass hunting, gathering, and trapping rights as well.

In *Kimball I* and *II,* the Ninth Circuit applied the *Menominee* holding to the Klamath Tribe and its terminated Reservation, finding that the Klamath treaty rights likewise survived termination of that Reservation and the sale of its lands. Both the Klamath and Menominee Termination Acts had the effect of completely terminating, or disestablishing, the status of the affected lands as Indian reservations.[4] 25 U.S.C. § 564(e), (p), and (q) (Klamath Termination Act); and 25 U.S.C. §§ 897 and 899 (Menominee Termination Act).

Recently, both the Seventh and Eighth Circuit Courts of Appeals have likewise held that treaty hunting and fishing rights survive the disestablishment of reservation boundaries and sale of reservation lands absent clear congressional language of extinguishment. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt,* 700 F.2d 341 (7th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 53 (1983), the Seventh Circuit held that tribal

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[4]In Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 815 n.3 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit discussed the various terms applied by courts to describe the cessation of reservation status:

> For the sake of clarity, we note that the question whether the boundaries of an Indian reservation, as drawn when the reservation was established, are redrawn after part of that reservation has been opened for settlement, has been expressed in several different ways by various courts. The process has been called disestablishment (referring to the disestablishment of the original reservation boundaries); diminishment (referring to a diminishing or shrinking of the original boundaries); termination of reservation status (if the original boundaries are redrawn, the reservation status of the land is no longer within the boundaries and thus is terminated); and a change of boundaries.

treaty rights to hunt, fish, trap and gather free of state regulation on public lands in the northern third of Wisconsin survived an agreement by the Tribe to "cede to the United States all that tract of country." *Id.* at 345. Noting that "treaty-recognized rights of use, or usufructuary rights, do not necessarily require that the tribe have title to the land," *id.* at 352, the Seventh Circuit held: "a termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history." *Id.* at 354 (citing *Menominee Tribe*, emphasis in original).

In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied* — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit considered whether two acts of Congress taking reservation lands for dam and reservoir purposes also resulted in a taking of tribal treaty rights to hunt and fish free of state regulation on the taken lands. Holding that tribal rights survived despite loss of possessory title, the Court found that the rights in issue were not appurtenant to the reservation land itself. The Eighth Circuit likewise relied on the cardinal principles that "in order to abrogate treaty rights and authorize the application of state law . . . Congress must *expressly* do so" and "doubtful expressions of congressional intent must be resolved in favor of the Indians." 711 F.2d at 822 (citing *Menominee Tribe*, emphasis in original).

Thus *Menominee Tribe* and the Seventh, Eighth and Ninth Circuit opinions that have followed it, establish that treaty rights to hunt and fish free of state regulation survive the disestablishment of reservation status, as

well as the loss of tribal title to the land, absent a clear expression of congressional intent to abrogate those rights.

B. The Ninth Circuit Did Not Err by Failing to Discuss the "Diminishment" Cases: Menominee Tribe v. United States, Which Involves More Difficult Facts, is Controlling.

In its Petition, the State of Oregon argues that the Ninth Circuit erred in failing to consider that the 1901 Cession Agreement "diminished the boundaries of the Klamath Indian Reservation." (Petition at 9). In fact, the Ninth Circuit did not discuss "diminishment" law simply because the question of the continuation of tribal hunting and fishing rights had already been resolved by this Court and the Ninth Circuit in the more difficult context of termination legislation. *See Menominee Tribe* and *Kimball I*. Diminishment of a reservation is subsumed within termination of a reservation.[5] Therefore, if tribal

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[5]This case, like *Menominee Tribe* and *Kimball I*, has proceeded from the day it was filed on the assumption that diminishment did occur as a result of the 1901 cession. In arguing that the *Menominee* analysis does not control here, Oregon fails to understand that the Termination Acts construed in *Kimball I* and *Menominee Tribe* are substantially more far-reaching than the Cession Agreement involved here and this, therefore, is an easier case. The extent of the State's confusion is revealed by its assertions that, after termination: (1) the lands of the Klamath Reservation remained subject to the Indians' right of occupancy (Petition at 9), and (2) the lands involved in *Menominee Tribe* remained within reservation boundaries (Petition at 11).

In fact, of course, just the opposite is true. The impact of the Termination Acts on the status of the Menominee and Klamath Reservations was much more comprehensive than the impact of the 1901 cession at issue here or other cession agree-

(Continued on next page)

hunting and fishing rights survive termination, *a fortiori*, they survive diminishment.

Thus, assuming "diminishment" and applicability of state laws for most purposes, the question resolved in the Indians' favor by the *Menominee* and *Kimball* courts was whether the complete congressional termination of reservation status had resulted in abrogation of the specific, constitutionally protected, treaty right to hunt and fish free of state regulation. In this case, the Ninth Circuit construed a less comprehensive congressional action in light of: (1) an express provision preserving consistent treaty rights, (2) an overall congressional purpose to honor treaty obligations, (3) congressional failure to mention hunting and fishing rights or pay compensation, and (4) the fact that the ceded lands were, for the most part, unsettled forest lands good for little else other than hunting, fishing and trapping. Unremarkably, the Ninth Circuit held that the rights did survive.

(Continued from previous page)

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ments construed in the "diminishment" cases. *See, e.g.*, DeCoteau v. District County Court, 420 U.S. 425 (1975). While turn-of-the-century cession agreements sometimes diminished reservation boundaries by removing the Indian country status of a portion of a reservation, the termination acts of the 1950's completely eliminated entire Indian reservations and brought to an end most aspects of the federal-tribal relationship. *See generally* F. Cohen, Handbook of Federal Indian Law, 815-16 (1932 ed.). Such was the case at both Klamath and Menominee: the Indian country status of both reservations was ended. The lands of the Klamath Reservation were sold outright. The lands of the Menominee Reservation were transferred to a private corporation chartered under Wisconsin law. Moreover, each Termination Act contained express language making the laws of the state applicable to the Tribe and its members, 25 U.S.C. §§564(q) and 899. In contrast, the 1901 Cession Agreement contained no comparable provision.

C. There is No Conflict in The Circuits.

Oregon further claims that a conflict exists between the Eighth and Ninth Circuits on the issue presented in this case. Relying on a United States District Court opinion that was affirmed in a three paragraph *per curiam* decision of the Eighth Circuit, *United States v. Minnesota*, 466 F.Supp. 1382 (D.C. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (*Red Lake*), Oregon argues that the rule in the Eighth Circuit is that where reservation lands are ceded and boundaries diminished, treaty hunting and fishing rights are thereby necessarily abrogated (Petition at 12-14).

However, in the subsequent *Lower Brule* case, *supra*, the Eighth Circuit made it plain, in a comprehensive 16-page opinion, that once diminishment occurs, courts must still engage in a *Menominee Tribe* analysis. The Eighth Circuit, like the Ninth Circuit, squarely recognized that this Court has ruled in *Menominee Tribe* that diminishment does not necessarily result in a loss of treaty rights:

> If either act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land *absent federal law preserving the Indians' treaty hunting and fishing rights. . . . Menominee Tribe v. United States*, 391 U.S. 404 (1968).

711 F.2d at 815 (emphasis added). Moreover, the *Lower Brule* Court declined to apply the *Red Lake* reasoning that hunting and fishing "rights are mere incidents of Indian title," 466 F.Supp. at 1385. The Eighth Circuit held that such reasoning:

failed to recognize that the Tribe's treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.

711 F.2d at 823 (footnote omitted, emphasis in original).[6]

The expansive and well-reasoned opinion of the Eighth Circuit in *Lower Brule* is entirely consistent with *Menominee Tribe* and its Ninth Circuit progeny, *Kimball I, Kimball II* and this case. There is no conflict in the circuits.

CONCLUSION

Menominee Tribe, Kimball I, Kimball II, Lac Courte Oreilles and *Lower Brule* together establish clearly that termination of reservation status and conveyance of reservation lands do not, absent a clear expression of congressional intent to abrogate, result in the loss of treaty rights to hunt and fish free of state regulation. No conflict among the circuits exists. Oregon's Petition should be denied.

[6] *Red Lake* is fundamentally distinguishable from this case on additional, equally important grounds. The right asserted in *Red Lake* was a right appurtenant to the land itself, *i.e.*, a right to enter upon private land to hunt and fish. The lands at issue in *Red Lake* were ceded by the Tribe to the United States pursuant to general authority granted the Secretary of the Interior by the Nelson Act, the purpose of which was "to restore the [Indian reservation] land to the public domain and open it to settlement by whites." 466 F.Supp. at 1387. In contrast, the right asserted here is only the right to hunt and fish free of state regulation: the Tribe asserts no rights against landowners. *Kimball II, supra*, 590 F.2d at 772. Additionally, the land cession at issue here was accomplished under a special act of Congress, the purpose of which was to finally settle a boundary dispute and honor treaty obligations. Opening the lands to settlement was clearly not a purpose of the 1901 cession agreement. Only one percent of the lands had been entered for settlement and virtually all were immediately placed in National Parks or National Forests.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

May a state regulate fishing, hunting and trapping on former Indian reservation lands ceded by an Indian tribe to the federal government under the following circumstances:

(1) a treaty had reserved to the Tribe the rights to fish, hunt and trap exclusive of state regulation on lands "included in the reservation;"

(2) the subsequent cession act provided that the tribal members "do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to" the ceded lands; and

(3) neither the cession act, its legislative history, nor the surrounding circumstances clearly indicated that Congress intended to restore to the tribal members their exclusive right to fish, hunt and trap on the ceded lands?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Klamath Indian Tribe (respondent herein); The Oregon Department of Fish and Wildlife; John Donaldson, individually and as Director of Oregon Department of Fish and Wildlife; The Oregon Fish and Wildlife Commission; Don Barth, John Boyer, Kenneth Klarquist, R. Gene Morris, Herbert Lundy, Fred A. Phillips, II, Jack Steiwer, each individually and as a member of the Oregon Fish and Wildlife Commission; John C. Williams, individually and as Superintendent of the Oregon State Police; Major Sterling Norton, individually and as Head of Fish and Game Division of the Oregon State Police, (petitioners herein).

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Argument

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984). (P.C., App. A).[1] The opinion of the United States District Court was not reported. (P.C., App. B).

JURISDICTION

The Ninth Circuit's opinion was dated and filed on March 27, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the court of appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). The petition for writ of certiorari timely was filed on June 25, 1984, and allowed by this Court on October 9, 1984.

STATUTES AND TREATIES INVOLVED

This case involves two acts of Congress. The first is the Treaty of October 14, 1864, 16 Stat. 707 (1866), in which the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded to the United States approximately 20 million acres of aboriginal lands and reserved an area comprising approximately 1.9 million acres. (P.C., App. C). The second is the Act of June 21, 1906, 34 Stat. 366, in which Congress ratified an agreement with the Klamath and other Indians that provided for the Tribe's cession of 621,824 acres

[1] As used in this brief, the abbreviation "P.C., App." refers to the appendix to the petition for writ of certiorari.

of former reservation land to the United States in exchange for $533,270. (P.C., App. D).

STATEMENT OF THE CASE

By the Treaty of October 4, 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded "all their right, title and claim" in approximately 20 million acres of aboriginal lands in exchange for a reservation of approximately 1.9 million acres. This land "until otherwise directed by the President of the United States," was to "be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation." 16 Stat. 707, (P.C., App. C).

Pursuant to the terms of the treaty, the Klamath Tribe members agreed and bound

> themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

Id. The treaty further provided that no white persons were to remain on the reservation and that the Indians would have the exclusive rights to occupy the reservation and to fish in the waters included in the reservation:

> It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; *and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . .*

Id. (emphasis added).

In 1871, the United States government surveyed the reservation's exterior boundaries. (J.A. 11). The survey erroneously excluded a large amount of land from the reservation boundaries because the natural boundaries referred to in the 1864 Treaty were not followed where they did not conform to township subdivision surveys. *Id.* In the years following 1871, tribal members complained because they believed land erroneously had been excluded from the reservation. (J.A. 11).

Congress responded to the tribal complaints in 1896 by authorizing the appointment of the Klamath Boundary Commission to determine the number of acres excluded from the reservation and the value thereof. *Id.* The commission interviewed tribal members who had been signatories to the 1864 Treaty. Many of these members testified they were convinced the excluded land was intended to be within the reservation boundaries because they had informed the Indian agent who negotiated the treaty that they wanted the land because of its fishing, hunting and gathering value. (Stip., Ex. D).[2] The commission's report was transmitted to the 54th Congress by the Secretary of the Interior, who noted in his transmittal letter:

> the Commissioners find the area of lands which have been excluded from the reservation by the erroneous surveys of its outboundaries to be 617,490 acres, and

[2] Various exhibits from the Stipulation of the Parties filed in the district court were not reproduced in the Petition for Certiorari or in the Joint Appendix. A list of exhibits appears on page 20 of the Joint Appendix.

determine the value of these excluded lands to be $533,270.

> The report in question has been carefully examined by the Commissioner of Indian Affairs, as shown by the accompanying communication dated 25th instant, who states that in his opinion a portion of the funds due the Indians should be made available for irrigation purposes for the benefit of the Indian allottees and the schools, . . . and the remainder of the sum recommended by the Commission to be paid . . . be expended under the direction of the Secretary of the Interior in the drainage and irrigation of lands, and in the purchase of cattle, wagons, mowing machines, and agricultural implements, the erection of houses, and for such other purposes as he may deem for the benefit of the Indians.
>
> The Commissioner submits an item for insertion in the Indian appropriation bill now pending, prepared in accordance with the above recommendations, and I have the honor to recommend that the matter receive early and favorable consideration by the Congress.

Id. The Boundary Commission Report mentioned that the character of the excluded area varied greatly, and that

> [w]ith the exception of the meadows of the Sycan and Sprague River sections, which are the principal bone of contention, the greater part of the excluded land consists of rocky and sterile mountain ranges, producing very ordinary timber and little grass.
>
> . . . .
>
> Giving these inferior tracts, the good timber land and the meadows of the Sycan and Sprague River valleys their proportionate valuation, we determine the value of the excluded land to be $533,270, or 617,490 acres at 86.36 cents per acre.

Id.

Following lengthy negotiations with the Klamath Indians, and after subsequent surveys revealed that 621,824 acres mistakenly had been excluded from their reservation, the

United States entered into a cession agreement with the Tribe on June 17, 1901, with respect to the erroneously excluded lands. (J.A. 12-13). This agreement was ratified by Congress in 1906. (J.A. 13).

Article I of the Act of 1906 provided that the Klamath Indians

> *do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation* lying between the boundaries described in the [1864] treaty . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

34 Stat. 366, (P.C., App. D; emphasis added).

Article II provided for the payment to the Klamath Indians of $537,007.20:

> In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full [sic] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one . . . .

Id.

Article III specified the manner of payment to the Indians of the $537,007.20. Article IV provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

Id.

Virtually all of the land ceded by the Klamath Tribe was closed to entry and placed in either national forests or parks. (J.A. 13-14). Since passage of the Act of 1906, tribal members have continued to fish, hunt and trap on the excluded lands without regard for state laws or regulations. (J.A. 14). The parties below agreed that although the State of Oregon generally asserted its jurisdiction over tribal members when they were fishing, hunting and trapping outside the reservation boundaries, the parties were unaware of any assertion by the state or denial by the Tribe of state jurisdiction over Indian fishing and hunting specifically with regard to the lands ceded in the 1906 Act. (J.A. 15).

On March 16, 1982, plaintiff Klamath Indian Tribe filed an action in the District Court for the District of Oregon, pursuant to 28 U.S.C. § 1331, to enjoin defendants State of Oregon Department of Fish and Wildlife, et al (hereinafter "State of Oregon" or "state") from interfering with tribal members' fishing, hunting and trapping of wildlife on certain lands, and for declaration of their rights with respect thereto. (J.A. 2-8). At issue, specifically, was the State of Oregon's authority to extend its fish and game laws to two areas of land: (1) lands outside the exterior boundaries of the Klamath Indian reservation as those boundaries existed at the time of termination of the Tribe in 1954, which lands had been ceded by the Tribe in 1906 to the United States (the ceded lands); and (2) lands within the boundaries of the reservation at the time of the 1954 termination, refered to as "C & O

lands." The defendants conceded they had no authority to exert state jurisdiction over the C & O lands.

On cross-motions for summary judgment, the district court granted judgment in favor of plaintiff Tribe and, declared that the Act of June 21, 1906, 34 Stat. 366, did not abrogate the treaty rights of the Klamath Indian Tribe to fish, hunt, and trap free from state regulation on lands ceded to the federal government under the 1906 Act. (J.A. 23). The State of Oregon appealed the district court's judgment to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291.

The Ninth Circuit affirmed the judgment of the district court. The court of appeals reasoned:

(1) The ceded lands originally were intended to be included in the Treaty of 1864 but were excluded by an erroneous survey that did not diminish the reservation's boundaries.

(2) The treaty rights to fish, hunt and trap were "not appurtenant to the Tribe's property interest in the former reservation land itself" but existed "apart from ownership of the land." 729 F.2d at 612.

(3) Under a provision of the 1906 Act securing to the Indians "all benefits under existing treaties not inconsistent with the Act," the treaty-reserved rights to fish, hunt and trap survived because they were not inconsistent with the 1906 Act.

(4) Because the treaty-reserved rights to fish, hunt and trap were not inconsistent with the cession agreement, "the

Tribe's treaty rights may be abrogated only by a showing of clear congressional intent." 729 F.2d at 612.

(5) The face of the 1906 Act, the surrounding circumstances and the legislative history show no clear congressional intent to abrogate the treaty-reserved rights to fish, hunt and trap on lands included in the reservation.

With respect to this last point the Ninth Circuit emphasized that the 1906 Act did not mention fishing, hunting and trapping rights. The court concluded that the Indians were not compensated for loss of fishing, hunting and trapping rights in the Cession Agreement and characterized this factor as evidence of congressional intent not to abrogate those rights. *Id.*

The State of Oregon petitioned this Court for a writ of certiorari on the asserted grounds that the Ninth Circuit Court of Appeals failed to appreciate and assess the legal significance of the 1906 Cession Agreement and that its decision conflicts with an opinion of the Eighth Circuit Court of Appeals in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (1980) (*per curiam*), *cert. denied*, 449 U.S. 905 (1980). This Court granted the state's petition.

SUMMARY OF ARGUMENT

This case presents a significant issue of Indian treaty and cession agreement law. The Ninth Circuit Court of Appeals erroneously held that the Klamath Indian Tribe retained rights to fish, hunt, and trap — exclusive of state regulation — on former reserved lands that subsequently were ceded to the federal government when 1864 reservation boundaries were

redrawn in 1906. Reversal is required because the court of appeals failed to apply the correct principle of law: When an Indian tribe cedes reservation land, thus diminishing reservation boundaries, the tribe's treaty rights exclusively to fish, hunt and trap correspondingly are diminished, unless the original treaty or the subsequent cession act manifest congressional intent that the tribe exercise those exclusive rights off the reservation.

The 1906 Cession Act undoubtedly diminished the boundaries of the 1864 reservation. The plain language of the 1906 Act,

> "The said Klamath . . . do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the [1864] treaty . . . and the reservation boundaries as established by the [1888] survey. . ."

precisely was suited to effect a diminishment of the Klamath Indian Reservation. The Ninth Circuit's refusal to acknowledge the patent effect of these terms stands in stark contravention of pertinent decisions of this Court such as *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Diminishment of the boundaries of the Klamath Reservation resulted in abrogation of exclusive fishing, hunting and trapping rights on the land removed from the reservation. Because the Ninth Circuit did not factor the boundary diminishment into its analysis, it did not consider the effect diminishment necessarily had on Indian treaty rights

exclusively to fish, hunt and trap. Courts, including this Court, that apparently or actually have considered this question have concluded that diminishment or disestablishment of reservation boundaries does abrogate treaty reserved fishing, hunting and trapping rights. *See Mattz v. Arnett*, 412 U.S. 481 (1973); *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.) *cert. denied*, 449 U.S. 905 (1980); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983); *State v. Hero*, 282 N.W.2d 70 (S.D. 1979).

This particular effect of reservation diminishment clearly is apparent in the present case. The 1864 Treaty reserved to the Klamath no off-reservation wildlife gathering rights, but rather limited exercise of those rights to the reservation. The purpose and effect of the 1906 Cession Act was to reduce the area of the reservation. The combination of these two factors logically leads to the conclusion that when the reservation was diminished, the area within which the Klamath could exercise exclusive fishing, hunting and trapping rights also was circumscribed. The plain language of the 1906 Cession Act mandates this conclusion. Just as this language was "precisely suited" to diminish the reservation, the terms were also particularly appropriate to extinguish the Tribe's exclusive fishing, hunting and trapping rights in the ceded lands.

Moreover, neither the terms of the 1906 Cession Act, its legislative history, nor the circumstances surrounding its enactment manifest a congressional intent to restore exclusive Indian fishing and hunting rights on the lands removed from the reservation. The clear portent of the oper-

ative cession language was not — as the Ninth Circuit mistakenly concluded — overridden by other savings clause language which merely reaffirmed the Indians' exercise of rights on the reservation, however described. The savings clause on which the court of appeals misplaced much reliance was not construed so expansively by this Court in *Rosebud Sioux Tribe v. Kneip, supra.*

The Ninth Circuit's reading of the 1906 Cession Act also lacks support in the pertinent legislative history. The Act, as the treaty it modified, was adopted in an era when national Indian policy favored the Indian's pursuit of agriculture, an interest at odds with a finding of implicit congressional intent to grant expansive Indian fishing and hunting rights. Furthermore, an intent to restore or reserve exclusive Indian fishing and hunting rights cannot be extrapolated from the lack of a reference to those rights in the Cession Act and from the fact that the principal value of the ceded land was its wildlife resource potential. In light of the then contemporary national policy, the most reasonable inference to be drawn is that the sum of money Congress paid in consideration for the cession of lands was intended to include compensation for abrogated fishing and hunting rights.

Finally, where the evidence of the parties' subsequent constructions of the 1906 Cession Act neither supports nor undermines a finding of congressional intent to restore exclusive wildlife gathering rights on the land removed from the reservation, the Act's terms of diminishment should be accorded due respect. As this Court has recognized, "Indian

treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943).

The court of appeals rewrote the clear terms of the treaty and cession agreement in this case. Its decision should be reversed, and the state's right to regulate fishing and hunting on the ceded lands should be recognized.

ARGUMENT

I. The court of appeals failed to apply the proper principle of Indian treaty law in concluding that the Klamath had exclusive authority to regulate fishing, hunting and trapping on lands ceded to the federal government.

The narrow issue presented by this case is whether the State of Oregon or the Klamath Indian Tribe has the power to regulate fishing, hunting and trapping on lands formerly included in the Klamath Indian Reservation established by an 1864 treaty, but subsequently ceded to the federal government in a 1901 Cession Agreement and 1906 Act. In holding that the state lacked the authority to regulate Klamath fishing, hunting and trapping on the ceded lands, the Ninth Circuit Court of Appeals did not apply the correct legal principle. That principle is straightforward. When an Indian tribe unequivocally cedes reservation land and thus diminishes reservation boundaries, its treaty rights to fish, hunt and trap exclusive of state regulation correspondingly are diminished, unless the treaty that established the reservation reserved such rights outside the reservation boundaries or Congress, at

the time of the subsequent cession agreement, clearly manifested its intent to grant those rights on the ceded lands to the Indians.

The court of appeals did not apply even a semblance of this rule in resolving the issue presented in this case. The lower court essentially held that loss of occupancy rights to the ceded land did not abrogate the Klamath Indian Tribe members' fishing, hunting and trapping rights because those rights were not tied to their occupancy of the ceded land.[3] The court then reasoned that because Congress had not clearly

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[3]The Ninth Circuit's assertion that the Tribe's usufructuary rights were not tied to the Tribe's possessory interest in the reserved lands conflicts with the 1864 Treaty and the Ninth Circuit's prior opinions in *Kimball v. Callahan* (*Kimball I*), 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 619 (1974) and *Kimball v. Callahan* (*Kimball II*), 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). In *Kimball I*, the Ninth Circuit interpreted the 1864 Treaty as not limiting the Tribe's wildlife gathering rights to the treaty-reserved right to fish on reservation lands. The court properly relied on this Court's analysis in *Menominee Tribe v. United States*, 391 U.S. 404 (1968) to hold that the Indians' possessory right to occupy the reservation as a residence included the right to fish, hunt, trap and gather on the reservation. The Court stated:

> In Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Supreme Court considered the Treaty of Wolf River of 1854, 10 Stat. 1064, which granted the Menominee Indians a reservation in Wisconsin. *The treaty made no mention of hunting and fishing rights, but provided that the reservation was to be held by the Indians "for a home, to be held as Indian lands are held." The Court agreed with the Court of Claims that this language includes the right to hunt and fish.*391 U.S. at 406, 88 S.Ct. 1705; Menominee Tribe v. United States, 388 F.2d 998, 1002, 179 Ct.Cl. 496, 503-504 (1967); State v. Sanapaw, 21 Wis.2d 377, 383, 124 N.W.2d 41, 44 (1963).
>
> *We find that the language "set apart as a residence for said Indians, [and] held and regarded as an Indian reservation" also includes those rights.* The specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty. *See* Menominee Tribe v. United States, 391 U.S. at 406, 88 S.Ct. 1705. . . .

(Footnote continued on next page)

manifested an intent to abrogate those rights on the face of the 1906 Cession Act, in the surrounding circumstances or the legislative history, those rights were not extinguished on the ceded lands.

The fundamental flaw of the Ninth Circuit's analysis is that it does not take into consideration the significant, undisputed facts that the 1864 Treaty reserved to the Tribe rights to fish, hunt and trap only as to lands within the reservation and the 1906 Act removed the ceded land from the reservation. The Treaty right to fish, hunt and trap, being a right limited to lands within the reservation, continued after 1906 only on the reservation as diminished. Congress did not manifest its intent in adopting the 1906 Cession Act that the Klamath's on-reservation fishing, hunting and trapping rights be continued off the reservation on the ceded land. Moreover, the 1906 Cession Act, with its language "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in the ceded lands, was "precisely suited"

(Footnote continued from previous page)

they entered into the treaty. *See* Menominee Tribe v. United States, 391 U.S. at 406, 88 S.Ct. 1705. . . .

493 F.2d at 565, (emphasis added; footnotes omitted).

The 1954 Klamath Termination Act severed the link between the Tribe's usufructuary rights and its right to possess reservation land as a home with respect to lands withdrawn from the reservation pursuant to the Termination Act. In *Kimball II*, the Ninth Circuit explained that the reason that the Tribe did not lose its right to fish, hunt and trap on land withdrawn through the Act was due to the Act's express provision that the Tribe retained the right to fish, hunt and trap on those lands. 590 F.2d at 772.

In declaring, in this case, that the Tribe's right to garner wildlife from the reservation land was separate and unrelated to its right to possess the reservation as a home, the Ninth Circuit wrongly and without acknowledgment, explanation or authority repudiated its rulings in *Kimball I* and *Kimball II* and this Court's analysis in *Menominee Tribe v. United States*.

to include relinquishment of all treaty rights of the Klamath, including fishing, hunting and trapping. The Ninth Circuit overlooked the logical meaning of this language in concluding that Congress did not manifest an intent on the face of the 1906 Act to abrogate treaty fishing, hunting and trapping rights on the land ceded to the federal government.

Application of the proper principle for resolution of this case, therefore, compels the conclusion that the 1906 Cession Act abrogated the Klamath's treaty rights exclusively to fish, hunt and trap on the ceded lands, and requires reversal of the Ninth Circuit's decision below.

II. The 1906 Cession Act abrogated the Klamath's treaty rights exclusively to fish, hunt and trap on the ceded land because the Act diminished the 1864 reservation boundaries, the 1864 Treaty limited exercise of those treaty rights to the reservation, and Congress did not manifest an intent in adopting the Cession Act that the Klamath be allowed to exercise their exclusive treaty rights on the ceded land.

A. The 1906 Cession Act unquestionably diminished the boundaries of the Klamath Indian Reservation.

In reaching the erroneous conclusion that the State of Oregon lacked jurisdiction to regulate fishing, hunting and trapping on the ceded lands, the lower courts ultimately failed to attach due legal significance to the effect of the 1906

Cession Act. Neither the district court nor the court of appeals fully acknowledged that the 1906 Cession Act diminished the boundaries of the reservation established by the 1864 Treaty. Given the language of the 1906 Cession Act, this Court's construction of almost identical operative language in other acts, and the Klamath's concessions below, the lower courts should have recognized that the 1906 Cession Act diminished the Klamath Indian Reservation boundaries.

Respondent Tribe conceded below that the 1906 Act diminished the boundaries, at least "for most purposes," (Resp. Br. below at 20, n. 6). In its brief to the court of appeals and in its response to the petition for certiorari, the Tribe noted that this case had proceeded from the beginning under the assumption that diminishment had occurred. (Resp. Br. below at 25, n. 9; Response to Cert. Pet. at 7, n. 5). But even if these statements are somewhat equivocal, the conclusion that the 1906 Cession Act diminished the boundaries of the Klamath Reservation is mandated by this Court's construction of similar operative language.

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court held that the employment of language, the "Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation," was "precisely suited" to the purpose of terminating the Lake Traverse Reservation. 420 U.S. at 445. In *DeCoteau*, this Court concluded that an act of Congress providing for the sale of Indian unallotted lands within the reservation, which

comprised 85 percent of the total land area within the reservation, had the effect of terminating the entire reservation such that the ceded, unallotted lands were no longer "Indian country" as defined in 18 U.S.C. § 1151. As a result, South Dakota had regulatory jurisdiction over the unallotted lands. The Court noted that the language employed in the cession acts

> is virtually indistinguishable from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. See nn 21 and 22, supra. That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.

420 U.S. at 446.[4]

This Court distinguished the facts in *DeCoteau* from those in the prior cases of *Mattz v. Arnett*, 412 U.S. 481 (1973) and *Seymour v. Superintendent*, 368 U.S. 351 (1962). Unlike *Mattz* and *Seymour*, *DeCoteau* involved a voluntary cession by the Tribe of unallotted lands and vested in the Tribe a "sum certain . . . in payment for the express cession and relinquishment of 'all' of the tribe's 'claim, right, title and interest' in the unalloted lands." 420 U.S. at 448.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this Court concluded that acts of Congress passed in 1904, 1907

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[4] The language from the other cession agreements ratified by Congress in the same 1891 Act, referred to by this Court in *DeCoteau*, included the terms "cede, convey, transfer, relinquish, and surrender forever and absolutely . . . all their claim, title, and interest of every kind and character"; "cede, grant, relinquish and quitclaim to the United States all right, title, and claim which they now have, or ever had . . ."; "cede, sell, and relinquish . . . all their right, title, and interest . . . ." 420 U.S. at 439, footnotes 21 and 22.

and 1910 diminished the boundaries of the Rosebud Sioux Reservation established by treaty in 1889. The three acts disposed of all unalloted lands in fou of the five counties which encompassed the reservation. The acts in question were preceded by a 1901 agreement with respect to the unallotted lands in Gregory County. This agreement with the Rosebud was negotiated by Inspector James McLaughlin, who negotiated many agreements during this period, including the 1901 Cession Agreement with the Klamath involved in the present case. The Rosebud agreement provided that subject to congressional ratification the Rosebud, for a sum-certain consideration,

> hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota.

430 U.S. at 591, n. 8.

The 1901 agreement was not ratified by Congress because Congress did not desire to bind itself to a sum-certain payment, preferring instead to pay the Rosebud as the unallotted lands were sold. This Court nevertheless relied upon the unratified agreement as indicative of congressional intent that the 1904 Act disestablish or diminish the Rosebud Reservation:

> What is important for our purposes is the undisputed fact that the 1901 Agreement, had it been ratified by Congress, would have disestablished that portion of the Rosebud Reservation which lay in Gregory County . . . [T]he effect and intent of the 1901 Agreement, if ratified, would have been to change

> the Reservation boundaries. As we noted in DeCoteau v District County Court, 420 US at 445 . . . in construing virtually identical language: "The Agreement's language . . . was precisely suited to this purpose [of disestablishment]". In this Agreement, therefore, we have — unlike in Mattz v Arnett, 412 US 481 . . . — an unmistakable baseline purpose of disestablishment.

430 U.S. at 591-92.

This Court then examined the legislative process which resulted in the 1904, 1907 and 1910 Acts, and concluded that the intent of the unratified 1901 agreement was carried out. In fact, the 1904 Act incorporated verbatim the cession language of the 1901 agreement. Referring to the language used in the 1904 Act, this Court again stated that "this language 'is precisely suited' to disestablishment." 430 U.S. at 597.

The importance of the cession language that appeared in *DeCoteau* and *Rosebud* recently was reaffirmed by this Court in *Solem v. Bartlett*, ___ U.S. ___, 104 S.Ct. 1161 (1984). The Court noted that "[o]ur precedents in the area have established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 1166. As this Court explained:

> Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an "intent to change boundaries" before diminishment will be found. *Rosebud v. Kneip, supra*, 430 U.S., at 615. The most probative evidence of congressional intent is the statutory lan-

guage used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau v. District County Court, supra*, 420 U.S., at 444-445; *Seymour v Superintentent, supra*, 368 U.S. at 355. When such language of cession is buttressed by an unconditional committment from Congress to compensate the Indian tribe for its opened land, there is an almost unsurmountable presumption that Congress meant for the tribe's reservation to be diminished. See *DeCoteau v. District County Court, supra* 420 U.S. at 447-448.

Id., (parallel citations omitted).

In *Solem v. Bartlett*, this Court concluded that the Cheyenne River Act of May 29, 1908, which authorized the Secretary of the Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading, did not diminish the boundaries of the Cheyenne River Sioux Reservation. The Act did not employ language evidencing congressional intent to terminate the reservation, but simply permitted non-Indians to settle within existing reservation boundaries. This Court found that the language employed in the Cheyenne Act stood

> in sharp contrast to the explicit language of cession employed in the Lake Traverse and 1904 Rosebud Acts discussed in our opinions in *DeCoteau* and *Rosebud Sioux Tribe*.

104 S.Ct. at 1168.

The language of the 1906 Cession Act involved in the present case, "the said Klamath . . . do hereby cede, surrender, grant and convey . . . all their claim, right, title and interest in and to [the ceded land]," is virtually identical to the

language involved in *DeCoteau v. District County Court, supra*, and *Rosebud Sioux Tribe v. Kneip, supra*. That the 1906 Cession Act diminished the boundaries of the Klamath Reservation is even more clear in this case because a primary purpose of the Cession Act was to compensate the Klamath for lands excluded from the boundaries of the reservation as described in the 1864 Treaty.

B. Diminishment of reservation boundaries results in relinquishment of on-reservation treaty rights in the land removed from the reservation, absent a manifestation of contrary congressional intent.

When disestablishment or diminishment of reservation boundaries has occurred, this Court has upheld state regulation of the area disestablished or removed from the reservation. *DeCoteau v. District County Court, supra*. Moreover, where this Court has not upheld state regulation of an area, it has reached this conclusion because the area had not been removed from the reservation boundaries. *Solem v. Bartlett, supra*; *Mattz v. Arnett, supra*; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Seymour v. Superintentent, supra*.

This Court, however, has not squarely addressed the effect of diminishment of reservation boundaries on treaty rights to fish, hunt and trap on lands within the reservation. The Court implicitly addressed this issue in *Mattz v. Arnett, supra*. Mattz claimed that a California game warden's seizure of his gill nets under authority of a California statute was improper because the nets were being used to catch fish within

Indian country as defined in 18 U.S.C. § 1151. Mattz argued that California's statutes were inapplicable to him because 18 U.S.C. § 1162(b) prohibited California from enforcing its fish and game laws within Indian country. The court below had concluded that the area where the nets were seized was not Indian country, and that 18 U.S.C. § 1162(b), therefore, did not preclude California from enforcing its fish and game regulations. This Court stated that its

> decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress or whether it remains "Indian country," within the meaning of 18 U.S.C. § 1151.

412 U.S. at 483. The court concluded that an 1892 Act of Congress which opened the reservation land for settlement had not terminated the reservation. The Court reversed the decision below and remanded for consideration by the lower court of Mattz' asserted fishing rights under the treaty establishing the Klamath River Indian Reservation.

Presumably this Court phrased the question in *Mattz* in the manner it did because if the land were no longer Indian country, Mattz would have been fully subject to California's jurisdiction, notwithstanding an asserted treaty right to fish on the land. Implicit, therefore, in this Court's decision is a holding that if the Klamath River Indian Reservation had been terminated, Mattz would have had no defense to California's assertion of jurisdiction to regulate his fishing on the former reservation regardless of his asserted treaty right to fish. This Court, therefore, must have assumed that Mattz' asserted treaty right to fish would have been extinguished if the reservation had been terminated.

In the present case, the Ninth Circuit not only failed to consider the implication of this Court's decision in *Mattz*, it also ignored the Eighth Circuit's resolution of the issue presented here: The effect of diminishment of reservation boundaries on treaty-reserved rights to fish, hunt and trap.

In *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980), the Eighth Circuit affirmed and adopted the district court's "well reasoned decision" (*United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979)), that the Band gave up its rights to fish, hunt, trap and gather wild rice free of the state's regulation of such activities, on land which it had agreed to cede to the federal government. In an 1863 treaty, the Red Lake Band had ceded ten million acres to the federal government in exchange for a 3.2 million acre reservation. The treaty made no mention of fishing and hunting rights although the Indians had been promised by the Indian agent who had negotiated the treaty that they could continue to fish and hunt on the ceded land until it was settled. Subsequent to this treaty, two additional land cession agreements were negotiated with the Indians whereby they agreed to cede all but 543,000 acres to the federal government. Neither agreement made any mention of hunting and fishing rights on the ceded land. The district court held that by the terms of the agreements, which provided that the Band "agreed to 'grant, cede, relinquish, and

convey to the United States all our right, title, and interest in and to' " the ceded land, the Band had relinquished all rights to fish, hunt and trap on the ceded land. The district court aptly noted that the language used in the cession agreements was "nearly identical" to that contained in *Rosebud Sioux Tribe v. Kneip*, *supra*, and *DeCoteau v. District County Court*, *supra*, wherein the Supreme Court had "[made] clear that the . . . language was precisely suited for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands." *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979).
(D. Minn. 1979).

The district court's analysis, adopted by the Eighth Circuit, did not end with the determination that the language "grant, cede, relinquish and convey all our right, title, and interest in and to" the ceded land resulted in the Band's relinquishment of its fishing, hunting and trapping rights in the ceded area. The court further analyzed the cession agreements and the circumstances surrounding their execution to determine whether Congress had granted back to the Band fishing, hunting and trapping rights in exchange for the ceded land.

The court first examined early treaties and noted that they had two things in common:

> first, that the normal practice was to state in the agreement if the Band was reserving hunting and fishing rights in the ceded area, and second, that when those rights were reserved it was only for a limited duration, typically until the influx of white settlers occurred.

Id. at 1386. In its analysis of surrounding circumstances and legislative history, the court stated:

> The Band's position is refuted by numerous pieces of historical evidence. The legislative history of the 1889 Nelson Act makes no mention of reserved hunting and fishing right, but rather makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites. *See generally*, H.R. Rep. No. 789, 50th Cong., 1st Sess. (1888) (Defendant's Exhibit F). Also, Congress had just recently enacted the Dawes Act in 1887, which established a policy of encouraging Indians to abandon their nomadic ways and adopt the agrarian lifestyle of whites. *See* Act of Feb. 8, 1887, c. 119, 24 Stat. 388. This suggests that Congress in 1889 probably would not have intended to allow the Red Lake Band to continue permanently its nomadic hunting and fishing habits over the lands ceded to the federal government.

Id. at 1387. The court concluded this portion of its analysis by stating that the "legislative history and the negotiations with the Band, if anything, [tend] to confirm that the enactments and agreements meant exactly what they said — the Band relinquished '*all* its right, title, and interest' to the areas ceded in 1889 and 1904." *Id.* at 1388 (emphasis in original).

Finally, the district court examined the subsequent construction given by the parties to the several enactments and agreements. The court noted on this point that the parties had conceded the federal and state governments' consistent position over the years that the members of the Band had no greater rights in the ceded area than did non-Indians, and that state gaming laws had regularly been enforced against Band members in the ceded areas.

The Ninth Circuit not only ignored *Red Lake Band*, it compounded this error by relying upon a later Eighth Circuit decision that in fact reaffirmed and distinguished its decision in *Red Lake Band*. In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 707 (1984), the Court of Appeals for the Eighth Circuit explained the significance of the fact that its decision in *Red Lake Band* was premised on the finding of a diminishment of the Band's reservation. At issue in *Lower Brule* was whether certain congressional acts had abrogated the Tribe's treaty right exclusively to fish and hunt on reservation lands taken by the federal government to facilitate construction of two water projects. Unlike *Red Lake Band*, *Lower Brule* was not, as the Eighth Circuit recognized, a case involving diminishment of an Indian reservation:

> The district court's reliance on this Court's *Red Lake* decision was misplaced. In that case, we explicitly emphasized that our finding of abrogation of hunting and fishing rights was premised on the fact that the reservation had been diminished when the Chippewa voluntarily ceded the property in question to the United States. *Red Lake Band of Chippewa Indians v. Minnesota*, *supra*, 614 F.2d at 1162. *Red Lake* does not stand for the proposition that Congress necessarily abrogates treaty-reserved hunting and fishing rights when it uses statutory language taking an interest in certain reservation land. When, as here, the statutes in question have not disestablished reservation boundaries, general language referring to the "entire interest" or "all claims" in certain land falls short of stating a clear purpose to abrogate specific

> treaty rights. *United States v. White*, *supra*, 508 F.2d at 455-58.

711 F.2d at 822-23.

The *Lower Brule* court earlier had discussed *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and the import of whether reservation boundaries had been disestablished:

> The first issue presented here is whether the Big Bend Act and/or the Fort Randall Act disestablished or diminished the boundaries of the Lower Brule Reservation. If no disestablishment occurred, the 1868 Fort Laramie Treaty would continue to preempt the application of state hunting and fishing laws on the reservation, and the Tribe would retain jurisdiction over tribal hunting and fishing on the land in controversy, except to the extent that the Tribe's rights have been abrogated by subsequent congressional action. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land absent federal law preserving the Indians' treaty hunting and fishing rights. *See id.*; *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

711 F.2d at 815 (footnote omitted). The Eighth Circuit concluded that no disestablishment of reservation boundaries had been effected and, therefore, no exclusive hunting and fishing rights had been abrogated, merely because a purpose of the congressional acts was to reimburse the Indians for the loss of the treaty right of exclusive occupancy of a portion of the reservation.

Because the *Lower Brule* case did not involve disestablishment or diminishment of reservation boundaries, the Eighth Circuit correctly examined the congressional acts to determine whether Congress manifested an intent to abrogate treaty rights. The Eighth Circuit correctly indicated that had the case involved a disestablishment of reservation boundaries, the court in light of its earlier *Red Lake Band* decision would have examined pertinent statutes and history to determine whether Congress had intended to grant back to the Tribe certain treaty rights abrogated as a result of disestablishment.[5]

The Ninth Circuit below did not address the Eighth Circuit's *Red Lake Band* decision. It did not explain why the analysis was faulty or why the present case was in any way distinguishable. The *Red Lake Band* principle that diminishment of reservation boundaries results in extinguishment of treaty rights on land removed from the reservation, absent

[5]The Ninth Circuit also erroneously relied on *Lac Court Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied* ___ U.S. ___, 104 S.Ct. 53 (1983), in concluding that the 1906 Cession Act had not extinguished the Klamath's exclusive fishing, hunting and trapping rights on the ceded lands. *Lac Court Oreilles Band*, however, like *Lower Brule*, did not involve the effect of disestablishment or diminishment of reservation boundaries on treaty-reserved rights to fish, hunt and trap. Furthermore, the treaty rights to fish, hunt and trap were rights which expressly had been reserved to the Band in cession agreements negotiated with the federal government. The agreements in *Lac Court Oreilles Band* are examples of the "normal practice" referred to by the district court in *United States v. Minnesota*, *supra*, to reserve fishing, hunting and trapping rights in cession agreements when the parties intended that those rights were to be retained on ceded lands. For other examples of cession agreements expressly reserving treaty rights in the ceded land, *see Antoine v. Washington*, 420 U.S. 194 (1975); *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983).

manifestation of contrary congressional intent, is cogent.[6] Its application to the fact situation presented here is particularly appropriate.

First, the 1864 Treaty resulted in a cession by the Klamath and other tribes of "all their right, title and claim to all the country claimed by them" and the setting aside, within the land ceded, of a tract of land "as a residence for said Indians, [to be held] and regarded as an Indian reservation." 16 Stat. 707, (P.C., App. 17-18). The 1864 Treaty further provided that "the exclusive right of taking fish in the streams and lakes, *included in said reservation* . . . is hereby secured to the Indians aforesaid." *Id.* at 19. (Emphasis added). Because the Klamath and other Indian tribes involved in execution of the 1864 Treaty ceded to the federal government all their right, title and claim to their aboriginal lands to the United States, the only rights they retained in these lands were those that the 1864 Treaty reserved to them. The Treaty reserved to the Klamath the right to occupy as a residence a specified

[6] In *State v. Hero*, 282 N.W.2d 70 (S.D. 1979), the South Dakota Supreme Court concluded that diminishment of the Rosebud Sioux Reservation, as determined by this Court in *Rosebud Sioux Tribe v. Kneip*, *supra*, extinguished the tribe members' treaty-reserved hunting rights as to the land removed from the reservation.

> Because Congress was attempting to carry forth the objectives of the 1901 Agreement in the Acts of 1904, 1907 and 1910, one of these being cession of all the tribe's claim, title, and interest of every kind and character in the ceded land to the federal government, we believe the conclusion logically follows that the tribe retains no special hunting and fishing rights upon land that is no longer reservation, absent some clear intention by Congress to reserve those rights to the Indians. . . .

282 N.W.2d at 71.

tract of land, the right to exclude white persons from the reservation and the exclusive right to take fish "in the streams and lakes included in said reservation." The Treaty reserved to the Klamath no off-reservation fishing, hunting or trapping rights but instead limited the exercise of those rights to the reservation.[7] It follows logically that when the 1906 Cession Act reduced the size of the reservation it also had the effect of reducing the area within which the Klamath could fish, hunt and trap.

Second, the language used in the 1906 Cession Act is "precisely suited" to effecting a complete conveyance of all rights the Klamath had to the ceded area by virtue of its status as reservation land. The Act provided:

> ARTICLE I. The said Klamath and other Indians . . . do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight. . . .
>
> ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement and in full [*sic*] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation . . . the United States stipulates and

[7] Article IV not only restricted the exclusive right of taking fish to "streams and lakes included in said reservation," it also restricted gathering rights to any area "within [the reservation's] limits." It is apparent that Congress' intent as to fishing and gathering was the same — it should be exercised only within reservation boundaries.

> agrees to pay to and expend for said Indians . . . the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents. . . .

34 Stat. 366, (P.C., App. 25-26).

Just as the foregoing language was "precisely suited" to effect a diminishment of the Klamath Indian Reservation, *DeCoteau v. District County Court, supra*; *Rosebud Sioux Tribe v. Kneip, supra*, the terms were "precisely suited" to abrogate any treaty-reserved rights of the Klamath in that portion of the former reservation ceded to the federal government.

Third, to conclude in the present case that diminishment of the reservation did not abrogate treaty rights would have an anomalous result, and one which Congress could not have intended. Article I of the 1864 Treaty provided not only that the Klamath have the exclusive right to take fish within the reservation, but that "no white person shall be permitted to locate or remain upon the reservation . . . and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom." 16 Stat. 707, (P.C., App 19). In other words, the Treaty also conferred on the Klamath the right to expel white persons from the reservation. Surely, Congress did not intend in the Cession Act that the Klamath should continue to be able to expel white persons from ceded land which was opened for settlement and also placed in national forests and parks. Yet, the Klamath's right to expel white persons was coterminous with their exclusive right to take fish within the reservation. One of Congress' primary means of ensuring the Klamath's exclusive right of taking fish within the reservation was to

keep white persons off the reservation. It necessarily follows that because Congress must have intended in the Cession Act that the Klamath would lose their right to expel white persons from the ceded land, Congress also intended that the Klamath would lose their exclusive right to fish on the ceded land.

The 1906 Cession Act stripped the ceded land of reservation status. Unless Congress manifested its intent somewhere in the Cession Act, its legislative history or the surrounding circumstances to allow the Klamath to continue to exercise their on-reservation treaty rights on the ceded land, this Court should conclude that the 1906 Cession Act extinguished the Klamath's treaty rights to fish, hunt and trap on the ceded land.

C. Congressional intent to reserve to the Klamath exclusive fishing, hunting and trapping rights on the ceded lands cannot be discerned from the 1906 Act, the legislative history, or the circumstances surrounding its passage.

1. Terms of the 1906 Cession Act.

As discussed above, the terms of conveyance in the 1906 Cession Act were "precisely suited" to effect a relinquishment of any exclusive Indian fishing and hunting rights on the ceded lands. The Ninth Circuit, however, mistakenly focused on Article IV of the 1906 Cession Act which provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

34 Stat. 366 (P.C., App 28).

The Ninth Circuit seized upon this language and concluded that the 1906 Cession Act preserved the Klamath's fishing, hunting and trapping rights on the ceded land. But the only rights which the Klamath had "under existing treaties" were the rights secured to them under the 1864 Treaty. As discussed above, these rights were limited to the boundaries of the reservation. Nothing in the 1906 Act deprived the Klamath of rights exercisable within the boundaries of the reservation, as diminished by the 1906 Cession Act.

Article IV assured the Klamath that they would be able to continue to exercise their treaty rights, but only within the limits of the diminished reservation. If the 1864 Treaty had conferred any off-reservation fishing, hunting or trapping rights on the Klamath, then the Cession Act would not have affected those rights. The 1864 Treaty, however, made no mention of the Klamath retaining off-reservation wildlife gathering rights, and hence, the 1906 Act could not preserve such prerogatives.

This Court should not countenance the Ninth Circuit's construction of Article IV of the 1906 Cession Act. Virtually identical terms also appeared in the acts which opened to settlement unallotted lands in the Rosebud Reservation, but the Court declined to read too much into the language. Notwithstanding the provision that "nothing in this agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to

which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement," *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 623 (Justice Marshall, dissenting), this Court found that the acts clearly evidenced congressional intent to diminish the boundaries of the Rosebud Sioux Reservation and to subject the Rosebud to South Dakota's jurisdiction. *Rosebud Sioux Tribe v. Kneip*, *supra*.

In any event, Article IV of the 1906 Act only preserved benefits "under existing treaties" which were "not inconsistent with" the 1906 Act. Article IV did not confer any additional rights on the Klamath. To conclude, as the Ninth Circuit did below, that Article IV had the effect of allowing the Klamath exclusively to fish, hunt and trap on the ceded lands would require this Court to construe Article IV as granting or reserving to the Klamath rights which were inconsistent with the plain language and purpose of the 1906 Cession Act.

2. *Legislative history and surrounding circumstances*

Neither the legislative history nor the circumstances surrounding the 1906 Cession Act evidence congressional intent to expand the Klamath's exclusive fishing, hunting and trapping rights beyond reservation boundaries. Such an intent would have been contrary to the then-prevailing national policy.

Both the original Klamath Treaty of October 4, 1864, and the 1906 Cession Act were formulated during the national era of Indian allotments and assimilation. The period was marked by comprehensive legislation authorizing the acquisition of Indian lands and resources, F. Cohen, *Handbook of Federal Indian Law* 128 (1982 ed.), and the policy was evident:

> Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers.

Id.

The primary goals of assimilation during those years were expressed in the General Allotment Act of 1887, commonly referred to as the Dawes Act. 24 Stat. 388, ch. 119.

> The idea was to settle the Indians on homesteads, introduce them to farming, and make them members of the non-Indian society.

Dawes, *Solving the Indian Problem*, Board of Indian Commn'rs Ann. Rep. 69-70 (1883), *reprinted in* Americanizing the American Indians (F. Prucha ed. 1973). The process of "civilization" was thought to be marked and brought about by, "the [Indian's] transition from the nomadic life of the hunter . . . to the settled life of the farmer." F. Prucha, *American Indian Policy in the Formative Years*, 213-14 (1962).

The original treaty of 1864 and the 1906 Cession Act reflect the then contemporary national policy. The primary purpose of the treaty was to advance Indian participation in the industries of civilization, particularly in agriculture. Article 2 of the Treaty stated that "in consideration of, and in payment for the country ceded by this treaty, the United States agree to pay the tribes conveying the same [an amount of money to] be applied to the use and benefit of said Indians by the Superintendent . . . so as to carry out the design of the expenditure, [it] being to promote the well-being

of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education." 16 Stat. 707. Article 3 advanced sums for subsistence during the first year on the reservation and for the purchase of "teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes." *Id.* Article 4 provided for the erection and tooling of a flouring-mill. Article 5 required the United States to furnish a Superintendent of farming operations as a farmer and a miller for 15 years. Article 6 provided for the allotment of lands. An examination of the terms of the Klamath Treaty shows that it, as the treaty construed in *Winters v. United States*, 207 U.S. 564 (1908), created a reservation for the purpose of changing the Indians' "nomadic and uncivilized" habits making them a "pastoral and civilized people." *Id.* at 576.

The history of the Klamath Treaty confirms what is evident from the language of the document — its purpose was to convert the Indians to agricultural pursuits. On June 22, 1864, Charles Mix, Acting Commissioner of Indian Affairs, sent J.W. Perit Huntington, Superintendent for Indian Affairs in Oregon, a letter authorizing a treaty with the Klamath, Modoc, and Paiute Tribes. The letter stressed the importance of providing for the Indians' agricultural pursuits when negotiating the boundaries of any reservation.[8]

[8] Commissioner Mix detailed the framework for negotiations:

> It is not the policy of the government to admit title in the wandering tribes of Indians upon the Pacific coast; and unless you

(Footnote continued on next page)

In December of 1864, Huntington reported to the Office of the Superintendent of Indian Affairs that in successfully negotiating a treaty he had carried out the principal purpose to locate the reservation on a tract which would support "industrial pursuits."[9]

(Footnote continued from previous page)

> find insuperable difficulties, I would advise that the treaty should be one of peace and friendship, and an agreement on the part of the Indians to reside upon a proper reservation, to be selected and distinctly marked, with an agreement on the part of the United States to provide them with such necessary supplies, farmers and mechanics, as will enable them to subsist and advance in civilization, so as to be able to take care of themselves. If, however, you find it necessary to negotiate for the exclusive possesion of any part of the country which they occupy, to enable our people to develop its mineral productions or avail of its agricultural resources, care should also be taken in that case that the boundaries of the portion retained by the Indians should be clearly defined, if possible, by natural landmarks, and that within its limits there should be such natural resources as will enable the Indians, with but little assistance from the government, and for a time but little departure from their ordinary pursuits, to obtain a livehood; and which shall also be as far removed as possible from white settlements, and least liable to be intruded upon by white settlers. The territory retained should also be adapted to grazing and agricultural pursuits, so that when in course of time they shall be reclaimed from their present wild and barbarous mode of life, and induced to turn their attention to more civilized pursuits, there will be no necessity for a new treaty and their removal to a new country.

Report of the Commissioner of Indian Affairs for the Year 1864, 112-13 (1864), reprinted in Report . . . 38th Cong., 2d Sess. H. Exec. Doc., v. 5, 256-57 (1864-65).

[9] Local Superintendent Huntington described the 1864 reservation and his objectives in the following terms:

> The country ceded by the treaty of 15th October is of vast extent, as you can see by reference to the map, say 15,000 to 20,000 square miles, and presents great diversity of topography, soil, and climate. Parts of it are barren mountains and sage plains, of no agricultural value, but probably possessing great mineral wealth. Other portions are valuable for grazing purposes, producing a large amount of nutritious grass, but containing little or no

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Clearly, the primary purpose of the 1864 Treaty was to promote agricultural activities by the Indians. Secondary purposes were to separate the tribe from white settlers[10] and to enable the tribe to acquire the attributes of the settlers' comparative prosperity.[11] The provisions of the treaty allow-

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(Footnote continued from previous page)

land fit for cultivation.

. . . .

> The reservation designated by the treaty for the Indians includes, besides much country almost a desert, the Upper Klamath lake or marsh, which affords great supplies of edible roots and seeds for the Indians, and much fine grazing land; and it gives them access to the Middle lake and the Klamath or Williamson river, connecting the two, for fishing purposes. It also takes in enough arable land of good quality near the mouth of Williamson river to support all the Indians which are ever likely to be placed upon it. The more extensive valleys upon the Middle and Lower lakes are not embraced within its limits. *In determining the bounds of the reservation, I sought primarily to secure a tract of country which had local advantages for supporting a colony of Indians by industrial pursuits.* A second object, and one scarcely less important, was to so locate the tribes that their separation from whites would be as nearly complete as possible. This reservation is not likely to be traversed by any important line of travel, and but a small portion of it will be coveted by whites for settlement.

Report of the Comm. of Indian Affairs for the Year 1865, 102 (1865), reprinted in Report . . . 39th Cong., 1st Sess., H. Exec. Doc, Doc. 1, U.S. Serial Set 1248, p 270 (1865). (Emphasis added).

[10] In his summary of the treaty, Huntington did not mention the grant of exclusive rights to fish and gather, but he noted that, "No whites except government officers and employes to be allowed to remain upon the reservation." Report of the Comm. of Indian Affairs for the Year 1865, *supra* n. 8.

[11] A reconstruction of the events leading up to the Treaty from the Indian perspective is contained in Stern, *The Klamath Indians and the Treaty of 1864*, 57 Or. Hist. Quart. 229 (1956). Stern concludes that it is probable that the comparative prosperity of the white settlers was the primary motivation of the Tribe to negotiate the treaty:

> The whites, settler and official, did not seem to see that there was no abstract reason why the Indian should be moved to abandon his own way of life for that of the white. It was well enough for subchief Henry Blow in later years to contrast the orderly life of the

(Footnote continued on next page)

ing no whites to remain upon the reservation and confirming exclusive fishing rights in streams and lakes "within the reservation" fostered these secondary purposes as well as the principal goal to motivate Indian agriculture.

By 1901, when the cession agreement was negotiated, the Klamath Tribe members reportedly were well on their way to fulfilling the design of the treaty. In a letter to the Secretary of the Interior dated December 18, 1896, the Klamath Boundary Commissioners said:

> [Klamath Tribe members] have, with rare exceptions, adopted the language, dress, and habits of the Whites, and the children are few who are not inmates of the excellent schools provided by the Government. An eager desire for further and continuous progress seems to animate young and old alike. The admirable provisions of the Government to enable them to acquire land in severalty and to build houses and barns are highly beneficial. One step further would assure their self-support and independence of Government aid.
>
> This step is some assistance to enable them to utilize profitably the lands now being allotted them.
>
> Grazing is the best and largely predominant resource of the reservation, therefore a few head of cattle as a start for each family would seem a prime necessity.

S. Doc. No. 93, 54th Cong., 2d Sess. (Stip., Ex. D).

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reservation with an almost anarchistic past. However great the weight of such sentiments in reservation days, they do not seem to have been prevalent at the time of which we speak. The impression, rather, grows that many Indians saw the comparative prosperity and power of the whites, and sought to acquire the attributes thereof in whatever ways they could.

Id. at 255 (footnote omitted).

In a letter to Congress dated March 3, 1900 the tribe wrote:

> On our part we have been true to our treaty stipulations, have made progress in civilization, and are making homes upon our allotted lands. About 250 of our children are being educated in our schools that they may understand their duty as Americans and live as such. We are improving our reservation by building houses and barns, opening irrigation ditches, fencing, and in many ways. This will make us self-supporting and will add to the wealth of the whole country.
>
> We have forever laid aside the wild customs and crude life of our fathers, and look forward to a time when we hope to prove our worth as loyal and law-abiding citizens.

H. Doc. No. 156, 56th Cong., 2d Sess. (Stip., Ex. E).

The documents, antedating the 1906 ratification of the 1901 Cession Agreement, informed Congress that both the Klamath Indians and federal administrative officials believed that the allotment and assimilation policy of the federal government successfully had been implemented. Article III of the 1906 Cession Act required that the money received by the Indians for their ceded lands be used to fund drainage and irrigation projects and to purchase cattle. Neither the prior history of the cession agreement nor the agreement itself contains any mention of fishing and hunting rights because reservation of those rights on the ceded lands would have been completely contrary to the agricultural goal of the 1864 treaty and the reported, mutually desirable agrarian progress made by the Klamaths after 1864.

The Ninth Circuit, however, took the Cession Act's lack of a reference to fishing and hunting rights out of the Act's historical context. It erroneously reasoned that because the

cession agreement did not mention fishing, hunting and trapping rights, the Klamath were not compensated for these rights, and therefore Congress must not have intended to abrogate those rights. The *ratio decidendi* in the analysis was the fact that "only a small part of the ceded lands was usable for agricultural purposes, and was far better suited for hunting, fishing, and trapping." *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d at 613.

This reasoning is fallacious. If the real value of the ceded land were for fishing, hunting and trapping, one wonders what the Klamath thought they were being compensated for, and what Congress thought it was paying the Klamath for, if not the wildlife resource value of the land. The court's reasoning makes it appear that Congress, in 1906, paid the Klamaths 87 cents an acre for land that had value only for fishing, hunting and trapping, and yet paid no compensation for loss of wildlife gathering rights. Under the Ninth Circuit misanalysis, Congress paid 87 cents per acre — over one-half million dollars total — for essentially nothing.

The lower court's reasoning should be rejected. In any event, because this is a diminishment case the inquiry is not whether Congress, in determining the compensation to be paid the Klamath, evidenced its intent to take away the Tribe's fishing, hunting and trapping rights. The inquiry is whether the compensation paid the tribe evidences clear congressional intent that the Klamath were to be granted back those rights. At best, the compensation issue raises an ambiguity as to what Congress intended, and does not estab-

lish congressional intent to restore exclusive fishing, hunting and trapping rights on the ceded lands.

3. Subsequent construction

In the present case, the scant facts concerning the parties' subsequent construction of the cession agreement ratified by the 1906 Act are in equipoise. The parties stipulated to the following facts:

> Members of the Tribe have continued to hunt, fish and trap on the excluded lands from the time of their cession to the present without regard for state laws or regulations.
>
> Before and after the 1906 cession, the State of Oregon generally asserted jurisdiction over hunting, fishing and trapping by Indians of the Klamath Reservation when outside the boundaries of the Reservation. The Department of the Interior and the BIA acknowledged State jurisdiction outside the reservation boundaries. (Exhibits J&L).
>
> The parties to this action are unaware of any assertion by the State or denial by the Tribe of state jurisdiction over Indian hunting and fishing with specific regard to the lands of the 1901 Cession Agreement.

(J.A. 14-15).

These facts shed little light on the question whether the 1901 Cession Agreement was intended or understood to grant the Klamath exclusive rights to fish, hunt and trap on the ceded lands. Resolution of the issue therefore turns on the review of the terms of the cession agreement, its legislative history, and the circumstances surrounding the execution of the agreement. As discussed above, clear congressional intent to restore to the the Klamath exclusive fishing, hunting and

trapping rights does not appear from the Cession Act, the legislative history or surrounding circumstances. Congress manifested its intent on the face of the 1906 Cession Act that the Klamath relinquish these rights in the ceded land. In holding otherwise, the Ninth Circuit rewrote the terms of the Cession Act to remedy a perceived injustice to the Klamath. The Ninth Circuit, thus, contravened this Court's counsel in *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943):

> Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*[12]

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[12] There is no basis for concluding that the Klamath were not informed about the effect of the cession agreement or that they did not have the opportunity to inquire as to its effect on their fishing, hunting and trapping rights if they had any questions. First, the Klamath were represented by counsel during this period (*see, e.g.* letter from attorneys McCammon and Belt to Commissioner of Indian Affairs, dated April 10, 1899. Stip. Ex. E). Indeed, Congress provided in Article III of the 1906 Act for payment of the Klamath's legal expenses. Second, the members of the Klamath and other tribes with whom Inspector McLaughlin negotiated

> were all intelligent Indians and representative men of the tribes, who understood and spoke English, so that an intepreter was

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(Emphasis added).

CONCLUSION

The court below misanalyzed this case. It totally ignored the fundamental principle of Indian treaty law that when Congress diminishes reservation boundaries, treaty rights exclusively to fish, hunt and trap on lands within the reservation are abrogated as to the land removed from the reservation. Those rights continue to exist on such land only if Congress clearly manifests an intent to restore those rights on the removed lands. Application of this rule to the facts of this case compels the conclusion that the Klamath relinquished their exclusive fishing, hunting and trapping rights on lands which they voluntarily ceded to the United States.

For these reasons, this Court should hold that the state properly may regulate the Klamath's fishing, hunting and trapping on 621,000 acres formerly within the boundaries of

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> unnecessary in our negotiations except at the first council, when about 150 Indians were present among whom were some very old men who did not understand English very well.

Letter dated October 29, 1900, from McLaughlin to Secretary of the Interior. (Stip. Ex. E). McLaughlin informed the Indians "that all their right, title, and interest to lands outside of the boundary commission line was ceded to the government by this treaty of October 14, 1864." *Id.* At the conclusion of the negotiations, McLaughlin "read the agreement to them, and had it interpreted paragraph by paragraph," after which all 128 Indians present "immediately signed their names." *Id.*

the Klamath Indian Reservation. The Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WOLDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 25, 1983
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mar. 15, 1982—Plaintiff's Complaint for Declaratory and Injunctive Relief filed in the United States District Court for the District of Oregon.

Apr. 22, 1982—Defendants' Answer filed in the United States District Court for the District of Oregon.

Sept. 8, 1982—Parties' Stipulated Facts on Cross Motions for Summary Judgment filed in the United States District Court for the District of Oregon.

Sept. 8, 1982—Plaintiff's Motion for Summary Judgment filed in the United States District Court for the District of Oregon.

Sept. 9, 1982—Defendants' Motion for Summary Judgment filed in the United States District Court for the District of Oregon.

Jan. 25, 1983—Judgment of the United States District Court for the District of Oregon.

June 25, 1984—Defendants' Petition for Writ of Certiorari filed.

Oct. 9, 1984—Certiorari granted.

PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed March 15, 1982]

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff,	)	Civil Action No. 82-367
	)	
v.	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
THE OREGON DEPARTMENT OF FISH AND WILDLIFE; JOHN DONALDSON, individually and as Director of Oregon Department of Fish and Wildlife; THE FISH AND WILDLIFE COMMISSION: DON BARTH, JOHN BOYER, KENNETH KLARQUIST, R. GENE MORRIS, HERBERT LUNDY, FRED A. PHILLIPS, II, JACK STEIWER, each individually and as a member of the Oregon Fish and Wildlife Commission; JOHN C. WILLIAMS, individually and as Superintendent, Oregon State Police; MAJOR STERLING NORTON, individually and as Head of Fish and Game Division of the Oregon State Police,	)	
Defendants.	)	

NATURE OF THE ACTION

1. This is an action for injunctive and declaratory relief authorized by Title 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiff by the Constitution of the United States and the treaties and laws thereunder. This action is brought by the Klamath Indian Tribe seeking to declare the rights of the plaintiff to federally secured treaty trapping, hunting and fishing rights within the boundaries of their ancestral reservation. These rights were secured to plaintiff by the Constitution, laws and treaties of the United States. Plaintiff asks for a declaration of those rights pursuant to 28 U.S.C. §§ 2201 and 2202, and for an injunction against state interference with those rights.

JURISDICTION

2. Jurisdiction is conferred upon this court by Title 28 U.S.C. § 1362 which provides for original jurisdiction of district courts in civil actions brought by an Indian Tribe wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Jurisdiction is also conferred upon this court by Title 28 U.S.C. § 1343(3) which provides for original jurisdiction of this court in suits authorized under Title 42 U.S.C. § 1983. Furthermore, jurisdiction is conferred by Title 28 U.S.C. § 1331 which provides for original jurisdiction of this court in suits arising under the Constitution, laws or treaties of the United States wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs. The amount in controversy exceeds the sum of $10,000 exclusive of interests and costs.

PLAINTIFF

3. Plaintiff Klamath Indian Tribe is the Tribe that was signatory to the Treaty of October 14, 1864, between the Klamath, Modoc and Yahooskin Band of Snake Indians of Oregon and the United States. The Klamath Indian Tribe possesses the sovereign authority to regulate the exercise of treaty hunting, fishing and trapping rights by tribal members on the lands of the former Klamath Indian Reservation within the boundaries established by the Treaty of October 14, 1864.

DEFENDANTS

4. The defendants are charged in various aspects under the statutes of the State of Oregon with the enactment, administration, enforcement, operation and execution of statutes, regulations, rules, policies, and procedures relating to hunting, fishing and trapping.

FACTUAL ALLEGATIONS

5. Plaintiff brings this action as owner of the treaty hunting, fishing and trapping rights, privileges and and [*sic*] immunities within the area of their aboriginal domain reserved to them by the Treaty of October 14, 1864 between the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians and the United States; Ratified July 2, 1866, proclaimed February 17, 1870; 16 Stat. 707 (hereinafter referred to as "the Treaty", a copy of which is attached hereto as Exhibit A).

6. Article I of the Treaty provided that "the exclusive right to taking fish in the streams and lakes, included in said reservation . . . is hereby secured to the Indians

aforesaid." This treaty right includes hunting and fishing rights.

7. By Act of July 2, 1864, 13 Stat. 355, ch. 213, Congress granted to the State of Oregon odd-numbered sections of land to build a military road, three wide on each side of the proposed road. Oregon accepted the grant and assigned it to the California and Oregon Land Company. Congress recognized this assignment by Act of June 18, 1874, 18 Stat. 80, ch. 305. Patents were issued to the State and to the road company for 420,240.67 acres of land, title of which was later acquired by the California and Oregon Road Company. Of these lands so acquired by the California and Oregon Land Company, 111,385 acres were within the boundaries of the Klamath Indian Reservation as established by the Treaty.

8. By Act of June 21, 1906, 34 Stat. 367, Congress authorized the Secretary of the Interior to exchange 87,000 acres of unallotted lands within the reservation for the 111,385 acres of allotted lands which were earlier conveyed by mistake. This transfer took place on August 22, 1906, without the knowledge or consent of plaintiff and without payment of compensation.

9. By agreement entered into on June 17, 1901, and ratified by Congress in the Act of June 21, 1906, 34 Stat. 367, plaintiff ceded to the United States 621,824 acres of land, more or less, lying between the reservation boundaries established by the Treaty of October 14, 1864, and the boundary lines established by the erroneous 1871 Mercer survey, later corrected by Thiel and approved by the General Land Office

in 1880. (The lands ceded by the Tribe in the Agreement of June 17, 1901, ratified by Congress in the Act of June 21, 1906, 34 Stat. 367, and the unallotted lands exchanged by the Secretary of the Interior pursuant to the authority granted in the same Act of June 21, 1906, 34 Stat. 367, are hereinafter collectively referred to as "the ceded lands.")

10. Article IV of the Agreement of June 17, 1901, as ratified by Congress in the Act of June 21, 1906 (34 Stat. 367) provides that "[i]t is understood that nothing in this agreement shall be construed to deprive the . . . Indians . . . of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement." (A copy of the Act of June 21, 1906 is attached hereto as Exhibit B.)

11. Plaintiff claims rights under the Treaty of October 14, 1864, to hunt, fish and trap on the ceded lands.

12. Since time immemorial, plaintiff's members and their ancestors have continually resided, fished and hunted in accordance with tribal law and custom within the boundaries of the Klamath Indian Reservation lands as established by the Treaty of October 14, 1864. Fish and game taken from the woods and streams of the ancestral reservation is a major source of diet and subsistence and plays an important role in plaintiff's traditional culture and religion.

13. Plaintiff's hunting, fishing and trapping rights are being interfered with and violated by defendant's practice and policies of enforcing Oregon Fish and Game laws and regulations against plaintiff's members on the ceded lands. Defendant's actions in enforcing these Oregon Fish and Game laws and regulations are in excess of their statutory

jurisdiction and authority, in contravention of the rights of plaintiff's members under the Constitution, treaties and laws of the United States.

14. An actual controversy exists between plaintiff and defendants concerning the power of the defendants to enforce Oregon State laws regulating hunting and fishing, as to plaintiff's members on the ceded lands. Defendants assert their power to enforce laws relating to hunting and fishing against plaintiff's members on the ceded lands, and plaintiff denies existence of that power.

15. Unless this court enters a declaratory judgment setting forth the rights of the parties, defendants will, in violation of federal law, continue to enforce Oregon hunting and fishing laws to plaintiff's members on the ceded lands to plaintiff's great and irreparable injury for which it has no plain, speedy or adequate remedy at law.

CLAIM FOR RELIEF

16. Defendant's acts constitute an unlawful interference with and deprivation of important treaty property rights of plaintiff under color of state law in violation of plaintiff's rights, privileges and immunities secured by the Constitution of the United States and the treaties and laws thereunder.

NEED FOR RELIEF

17. Plaintiff's members currently exercise their treaty fishing, hunting, and trapping rights on the ceded lands within the boundaries of the ancestral Klamath Indian Reservation and in doing so run a very substantial risk of suffering irreparable injury, loss and damage resulting from being

unlawfully regulated, interfered with, arrested and penalized as a result of defendants' policies unless this court grants injunctive relief.

18. Defendants will suffer no substantial harm, inconvenience, or injury as a result of plaintiff's securing extraordinary relief.

WHEREFORE, plaintiff respectfully prays that this court:

1. Assume jurisdiction of this case;

2. Enter preliminary and permanent orders enjoining the defendants from continuing policies which result in interference with the rights of plaintiff's members to exercise their federal treaty and federal statutory rights with respect to fishing, hunting and trapping on the ceded lands within the boundaries of their ancrestral [*sic*] reservation;

3. Order that a declaratory judgment be entered pursuant to Title 28 U.S.C. §§ 2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure declaring that plaintiff's members have the right, privilege and immunity afforded them under the Treaty of October 14, 1864, 16 Stat. 707, between the Klamath Indian Tribe and the United States to hunt, trap and fish on the ceded lands within the boundaries of their ancestral Klamath Indian Reservation free of Oregon State Game and Fish regulation; and

4. Order that such other and further relief be granted as this court deem proper and just.

DATED this 15th day of March, 1982.

[Signature omitted in printing]

DEFENDANTS' ANSWER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed April 22, 1982]

[Title of case omitted in printing]

Defendants answer plaintiff's Complaint as follows:

I

Answering paragraphs 1 and 2, defendants challenge that this Court has jurisdiction under 42 USC § 1983 and 28 USC § 1362.

II

Answering paragraphs 3 and 5, defendants deny that plaintiff possesses the authority therein alleged beyond the boundaries of the Klamath Indian Reservation as it existed at the time of termination in 1954.

III

Answering paragraph 8, plaintiff denies that the transfer therein alleged took place without the knowledge or consent of plaintiff and without payment of compensation.

IV

Answering paragraph 12, defendants allege that they are without information or belief as to whether, and if so, the extent to which plaintiff's members have continually resided, fished and hunted in accordance with tribal law and custom beyond the boundaries of the Klamath Indian Reservation as it existed at the time of termination in 1954.

V

Answering paragraph 13, defendants admit they enforce Oregon fish and game laws and regulations upon the lands described as ceded lands. Except as so expressly admitted, defendants deny the allegations of said paragraph.

VI

Defendants deny the allegations of paragraphs 16, 17 and 18.

WHEREFORE, defendants pray that plaintiffs be denied the relief prayed for herein.

[Signatures and certification omitted in printing]

PLAINTIFF'S STIPULATED FACTS ON CROSS MOTIONS FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed September 8, 1982]

A. *TREATY*

1. By the Treaty of October 4, 1864, 16 Stat. 707, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded approximately 20 million acres of aboriginal lands in exchange for an approximately 1.9 million acre reservation (Exhibit A). The Tribe's exclusive hunting, fishing and trapping rights on reservation land were recognized and confirmed by this treaty. The treaty in relevant part provided:

> [T]he following tract . . . shall be set apart as a residence for said Indians [and] held and regarded as an Indian reservation . . . . [T]he exclusive right of taking fish in the streams and lakes, included in the reservation . . . is hereby secured to the Indians.

B. *Cession of Excluded Lands*

2. In 1871, government surveyor Mercer surveyed the reservation's exterior boundaries. Mercer's survey erroneously excluded much land from the boundaries of the reservation because he ignored natural boundaries where they did not conform to township subdivision surveys. Sen. R.No. 62, 53rd Cong. 3d Session (1895) (Exhibit B).

3. In 1888, William Thiel resurveyed the reservation to correct the errors made by Mercer. Thiel's survey also excluded much land from the boundaries of the reservation.

4. Following years of tribal complaints beginning shortly after the 1871 survey, Congress in 1896, authorized the appointment of a commission to determine the number of acres excluded by Thiel's survey and the value thereof. Act of June 10, 1896, 29 Stat. 321. Sen. Rep. No. 129, Cong. 2d Session (1894) (Exhibit C).

5. The Klamath Boundary Commission, in a report dated December 18, 1896, determined that 617,000 acres had been erroneously excluded at a value of 86.36 cents per acre, or $533,270.00. Klamath Boundary Commission Report, S.Rep. No. 93, 54th Cong., 2d Sess. (1897). (Exhibit D).

6. The Boundary Commission arrived at the value of 86.36 cents per acre by examining the character of the land itself. The Boundary Commission assessed such factors as soil quality; amount and quantity of meadow and grazing lands; area of volcanic rock formations; extent of mountainous and rocky areas; and amount of value of timber on the land. The Boundary Commission did not take the value of the Tribe's hunting, fishing and trapping rights into account when arriving at its valuation of the land. *Id.*

7. By Act of July 1, 1898, 30 Stat. 571, Congress directed the Secretary of the Interior to resurvey the exterior boundaries of the reservation and negotiate with the Klamath for cession of the excluded lands.

8. The Secretary appointed Inspector McConnell to carry out the provisions of the Act of July 1, 1898, and on January 2, 1899, McConnell submitted his report together with an agreement with the Tribe for cession of the excluded lands. The

number of acres ceded, however, was to be finally determined by a resurvey of the reservation as provided in The Act of July 1, 1898. House Doc. No. 156, 56 Cong., 2d Sess. 3 (Dec. 8, 1900) (Exhibit E).

9. The Bureau of Indian Affairs was dissatisfied with McConnell's report and agreement and, in 1900, Inspector James McLaughlin was appointed to renegotiate an agreement with the Klamath Indians. *Id.*

10. On May 7, 1900, the Commissioner of the General Land Office advised the BIA that he had accepted a survey of the reservation boundary that shows 621,824 acres had been excluded from the reservation by the erroneous surveys. *Id.*

11. Inspector McLaughlin entered into an agreement with the Klamaths on October 24, 1900, which agreement provided for the cession of the excluded lands in return for payment by the United States at a rate of 86.36 cents per acre. Senate Report No. 198, 59th Cong. 1st Sess. 8, 9 (1906) (Exhibit F).

12. On June 17, 1901, Inspector McLaughlin negotiated another agreement with the Klamath Tribe. This was necessitated by the fact that McLaughlin's first agreement mistakenly recited the 1871 survey rather than the 1888 survey. McLaughlin's second agreement was identical to his first with the exception of the corrected survey references. *Id.*

13. This agreement was ratified by the June 21, 1906 Act of Congress, 34 Stat. 367 (Exhibit G).

14. Virtually all the land ceded by the Tribe was immediately closed to entry and placed in either national forests or parks. On September 28, 1893, an executive order was issued

establishing the Cascade Forest Reserve out of the western portion of the excluded lands. 28 Stat. 1893.

15. By Act of May 22, 1902, 32 Stat. 202, Crater Lake National Park was established. It included most of the lands in the western tract.

16. On July 31, 1903, withdrawals were made of most of the remaining sections in the western tract and large portions of the eastern tract for Warner Mountain Forest Reserve. *Klamath and Modoc Tribes etc., v. United States*, 20 Ind. Cl. Comm. 522, 532 (Docket No. 100-A, Decided May 14, 1969) (Exhibit H).

17. The Warner Mountain Forest Reserve was a temporary solution and varicus of the eastern tract lands were restored to the public entry on January 5, 1905. *Id.*

18. Goose Lake Forest Reserve was established on August 21, 1906, also out of the eastern tract. 34 Stat. 3226.

19. On May 14, 1969, the Indian Claims Commission awarded the Tribe $4,152,992.80 to make up for the unconscionable consideration paid the Tribe by the United States for the excluded lands. In arriving at this value, the Commission examined the value of grazing and timber harvesting on the land sold. The Commission did not take the Tribe's hunting, fishing and trapping rights into consideration in making its assessment. *Klamath and Modoc Tribes etc. v. United States*, *supra* at 543.

20. Members of the Tribe have continued to hunt, fish and trap on the excluded lands from the time of their cession to the present without regard for state laws or regulations.

21. Before and after the 1906 cession, the State of Oregon generally asserted jurisdiction over hunting, fishing, and trapping by Indians of the Klamath Reservation when outside the boundaries of the Reservation. The Department of Interior and the BIA acknowledged State jurisdiction outside the reservation boundaries. (Exhibits J&L).

22. The parties to this action are unaware of any assertion by the State or denial by the Tribe of state jurisdiction over Indian hunting and fishing with specific regard to the lands of the 1901 Cession Agreement.

C. *California and Oregon Lands (C & O Lands)*

23. By Act of July 2, 1864, 13 Stat. 355, Congress granted to Oregon odd-numbered sections of land to aid in the construction of a military wagon road. The Act provided that no grants be made of lands previously reserved to the United States.

24. On October 24, 1864, Oregon transferred to the Oregon Central Military Road Company all rights it had under the Act of July 2, 1864. Laws of Oregon of 1864, p. 36.

25. On April 2, 1872, patents were issued to the Oregon Central Military Road Company.

26. On July 27, 1866 and November 26, 1867, officers of the Oregon Military Road Company certified to Governors of Oregon Gibbs and Warden that 92 1/2 miles of road had been built in accordance with the Act of Congress of July 2, 1864 and the Act of Oregon of October 24, 1864.

27. 402,240.67 acres were then granted to the Oregon Military ~~Road~~ Company, 111,385 acres of which were within the Klamath Reservation and had already been allotted to individual Indians.

28. The Oregon Military Road Company conveyed these lands to the California and Oregon Land Company in 1877.

29. By Act of March 2, 1889, Congress directed the United States Attorney General to bring suits against all persons having interest in lands granted to the State of Oregon under the Act of July 2, 1864 to determine whether the roads were granted in accordance with the terms of the granting acts and to obtain judgments declaring forfeiture of these lands to the United States. The Act preserved rights of bona fide purchasers for value.

30. Suit was brought by the United States Attorney General for forfeiture of lands conveyed to the California and Oregon Land Company.

31. After extensive litigation, it was determined that the California and Oregon Land Company took as bona fide purchaser for value from the Oregon Central Military Road Company and so was protected under the Act of March 2, 1889, 25 Stat. 850. *United States v. California and Oregon Land Co.*, 148 U.S. 31 (1893).

32. In a separate action, the United States Attorney General filed suit against the California and Oregon Land Company to recover lands within the Klamath Reservation on the grounds that the lands had already been reserved under the terms of the Act of July 2, 1864, 13 Stat. 355.

33. The action was ultimately dismissed by the United States Supreme Court. The Court held that the action was barred under the doctrine of *res judicata* as the issue could have been raised in the earlier litigation. *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1904).

34. By Act of March 3, 1905, 33 Stat. 1033, Congress directed the Secretary of Interior to ascertain the value of the land held by C & O Land Company within the Klamath Reservation, the amount of those lands previously allotted to individual Indians, and for what price the C & O Land Company would convey the lands to the United States or on what terms the Company would exchange such lands for nonallotted lands within the boundaries of the reservation.

35. By Act of June 21, 1906, 34 Stat. 367, the Secretary of the Interior was directed to exchange the 111,385 acres of unallotted lands within the Klamath Reservation. (Exhibit G, *supra*)

36. On August 22, 1906, the C & O Land Company exchanged the 111,385 acres of allotted lands within the reservation for 87,000 acres of unallotted lands within the reservation. This exchange was made without compensation and without the knowledge or consent of the Tribe.

37. By Act of April 30, 1908, 35 Stat. 70, Congress appropriated $108,750.00 to compensate the Tribe for the 87,000 acres exchanged under the Act of June 21, 1906. The Act provided that the compensation would not be effective until the Indians "execute a release of any claims and demands . . .

for the land involved." No compensation was provided for abrogation of the Tribe's hunting, fishing and trapping rights.

38. On January 9, 1909, a release was executed by the Tribe which provided that the Tribe does "hereby relinquish any and all claims and demands of any kind and character which they now have or may hereafter have against the United States for the land involved." This release was held valid in *Klamath and Modoc Tribes v. United States*, 296 U.S. 244 (1935).

39. By Act of May 15, 1936, 49 Stat. 1276, Congress conferred jurisdiction on the Court of Claims to award compensation for the 87,000 acres taken under the Act of June 21, 1906 irrespective of the January 6, 1909 release given by the Tribe.

40. On June 7, 1937, the Court of Claims awarded the Klamath Tribe $5,313,347.32 against the United States as compensation for the 87,000 acres taken under the Act of June 21, 1906, *supra*.

41. The Court of Claims looked at the value of the timber on the land in arriving at its valuation of the land. The court did not include the value of the Tribe's hunting, fishing and trapping rights in its award. *Klamath and Modoc Tribes v. United States*, 85 Ct. Cl. 451 (1937). The Court of Claims' decision was upheld in *United States v. Klamath and Modoc Tribes*, 304 U.S. 119 (1938).

42. The parties are unaware of any instance where the State has enforced its game and fish laws and regulations on

the "C & O" lands. The parties are further unaware of whether the State has ever asserted jurisdiction in this area.

43. Hunting, fishing, gathering and trapping was crucial to the survival of the Klamath Indians at the time of the 1864 Treaty, the 1901 Agreement, and the 1906 Act of Congress (Exhibits I and K), and continues to this day to play a highly significant role in the lives of the Klamath Indians. *See Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974).

Date: Sept. 7, 1982

[Signatures omitted in printing]

LIST OF EXHIBITS TO STIPULATED FACTS

A. Treaty of October 4, 1864, 16 Stat. 707
B. Sen. Ex. Doc. No. 62, 53rd Cong. 2d Session (1895)
C. Sen. Ex. Doc. No. 129, 53rd Cong. 2d Session (1894)
D. Klamath Boundary Commission Report, Sen. Doc. No. 93, 54th Cong. 2d Session (1897)
E. House Doc. No. 156, 56th Cong., 2d Session (1900)
F. Sen. Rep. No. 198, 59th Cong., 1st Session (1906)
G. Act of June 21, 1906, 34 Stat. 367
H. *Klamath and Modoc Tribes v. United States*, 20 Ind. Cl. Comm. 522)1969) [*sic*]
I. Letter; Rev. Jesse Kirk to Commr. of Indian Affairs, March 7, 1902
J. Letter; Secretary of the Interior to Commr. of Indian Affairs, May 19, 1902
K. Letter; Walter Moyle, Esq. to Commr. of Indian Affairs, March 5, 1936
L. Letter; Commr. of Indian Affairs to Moyle, April 7, 1936

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed September 8, 1982]

[Title of case omitted in printing]

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiff respectfully moves this Court for entry of Summary Judgment in its favor declaring that the Tribe retains its Treaty rights to hunt, fish, trap and gather on the lands of the former Reservation which were the subject of the Act of June 21, 1906. There is no genuine issue as to any material fact and the Tribe is entitled to Summary Judgment as a matter of law, as set forth in the accompanying Memorandum of Support.

[Signature and certification omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed September 9, 1982]

[Title of case omitted in printing]

Defendants respectfully move the court for summary judgment herein.

Said motion is based upon the parties [*sic*] stipulated facts on cross motions for summary judgment and upon the memorandum of law submitted herein.

[Signatures omitted in printing]

UNITED STATES DISTRICT COURT JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed January 25, 1983]

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 82-367-SO
	)	
THE OREGON DEPARTMENT OF FISH AND WILDLIFE, et al.,	)	JUDGMENT
	)	
	)	
Defendants.	)	
	)	

IT IS ORDERED that summary judgment in favor of the plaintiff is granted.

IT IS FURTHER ORDERED AND DECLARED that the Act of June 21, 1906, 34 Stat. 367 (the Act), did not abrogate the treaty rights of the Klamath Indian Tribe, plaintiff, to hunt, fish, trap and gather, free from regulation by the defendant State of Oregon, either on the lands exchanged by the Secretary of the Interior under the authority granted in the Act or on lands ceded by the Tribe under the June 17, 1901 agreement and ratified by the Act.

DATED this 25th day of January, 1983.

[Signature omitted in printing]

Office-Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2148

In The

Supreme Court of the United States

October Term, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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BEST AVAILABLE COPY

QUESTION PRESENTED

In an 1864 Treaty with the United States, the Klamath Tribe reserved hunting and fishing rights within its Reservation. In a 1901 agreement, the Tribe ceded to the United States 621,824 acres that had been excluded from the 1864 Treaty Reservation boundary by erroneous government survey. The agreement, concluded pursuant to a special act of Congress for the purpose of honoring Klamath Treaty obligations, did not mention hunting and fishing rights but provided that treaty rights "not inconsistent with the provisions of this agreement" would be preserved. Thereafter, virtually all of the lands were closed to entry and placed either in national forests or a national park. The question presented is:

Whether, under these unique circumstances, Congress intended that the 1901 cession agreement implicitly extinguish Klamath Indian Treaty rights to hunt and fish free of state regulation in the ceded area.

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STATEMENT OF THE CASE

By the Treaty of October 4, 1864, 16 Stat. 707, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded roughly 20 million acres of aboriginal land to the federal government, retaining a reservation of approximately 1.9 million acres (J.A. 11, Stip. 1 and P.C., App. C). The Treaty confirmed exclusive tribal hunting, fishing, trapping and gathering rights within the Reservation:

> [T]he following . . . shall be set apart as a residence for said Indians [and] held and regarded as an Indian reservation. . . . [T]he exclusive right of taking fish in the streams and lakes, included in the reservation . . . is hereby secured to the Indians.

However, because government surveyors ignored the natural boundaries described in the Treaty where they did not conform to the township subdivision surveys, S. Ex. Doc. No. 62, 53d Cong., 3d Sess. 8 (1895) (Stip., Ex. B),[1] 621,824 acres were excluded from the reservation boundary (J.A. 11-12, Stip. 2 and 3). Following years of tribal complaints, Congress, in an act appropriating money for the "current and contingent expenses of the Indian Department . . . and fulfilling treaty stipulations for the various tribes," directed that a boundary commission be established to determine the amount and value of the land excluded by the incorrect surveys. Act of June 10, 1896, 29 Stat. 321; S. Ex. Doc. No. 129, 53d Cong., 2d Sess. (1894) (Stip., Ex. C).

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[1]The agreed upon facts in this case are set forth in the parties' Stipulated Facts on Cross Motions for Summary Judgment, contained in the Joint Appendix. Exhibits to the Stipulated Facts were not reproduced in the Joint Appendix; they are contained in the plaintiff Tribe's Supplemental Appendix in the Appeals Court Record.

Noting that Congress desired to act "with the greatest equity," S. Doc. No. 93, 54th Cong., 2d Sess. 5 (1897) (Stip., Ex. D), the boundary commissioners interviewed numerous Indians who were signatory to the 1864 Treaty in order to ascertain their understanding of the Treaty. Numerous Indians testified that they were certain the excluded land was intended to be within the Reservation. Because of the land's importance to the Tribe for hunting, fishing and gathering, they had specifically insisted on its inclusion within the Reservation and Commissioner Huntington had acceded to their wishes. Thus, Henry Blow, an Indian who signed the Treaty, testified as follows:

> Q. Was anything said by Mr. Huntington or the Indians about Sycan or Sprague River Valley?
>
> A. Yes; the Indians said they wanted to keep these two valleys for the camas roots and pastures, the fish, etc., as well as the game in the mountains.

Id. at 14 (Stip., Ex. D). Another Treaty signatory, Mo Ghen Kas Kit, explained the treaty negotiations in greater detail:

> At the time of the treaty of Council Grove we, the Indians, told Mr. Huntington, before and after describing these points, that we particularly wanted all the Sycan Valley down to Ish tish e wax, including the Sprague River Valley, because we needed it, especially for the camas and other roots in the valley and the game and the fishing at the Ish tish e wax.
>
> *The main part of the living and subsistence of the Klamaths and Snakes was obtained from these two valleys—such as camas, kooh!, dowex wo-kus, and many other roots and seeds—all of which were largely produced on these places, which, with the fish from the Ish tish e wax, formed the principal part of their living.*

> The Indians particularly told Mr. Huntington of this great need of these two valleys for this purpose, and they were dependent upon them principally for their living. All the headmen and leaders among the Indians saying this—and Mr. Huntington said 'I will—you shall have them in the treaty.' I was a signer of the treaty. I was the head chief of my tribe—the Sprague River Klamaths—and anxious and responsible for their welfare. . . .

Id. at 15, 16 (emphasis added).

In addition to relying on the testimony of the Indians in ascertaining the correct boundary, the Commission placed great weight on the facts that the Klamath Treaty provided no governmental support and the land was poor for agriculture. Therefore, the Commission concluded, the erroneously excluded areas must have been intended as part of the Reservation since they were among the choicest areas for hunting, fishing and gathering.

> It was evidently a principal object of the treaty to draw the Indians in from the large extent of territory over which they were roaming, subject to constant collisions with the steadily encroaching whites, and to concentrate them on an area much more limited, but which would still be ample to provide them with the means of subsistence.
>
> To attain this, the marked tendency of the treaty and the emphatic testimony of the Indians seek to make all the boundaries mountain ridges, a purpose of which the nature of the country renders easy of accomplishment on all sides except the north.
>
> There is no provision in the treaty, however, for the support of the Indians by the Government, and as the high altitude and the severity of the climate are unfavorable to the cultivation of cereals, their subsistence depended upon natural products, consisting primarily of game, fish, wild roots, and seeds. These

> mountain barriers, therefore, must include a territory frequented by game, streams stocked with fish, and ground producing the roots and seeds which formed so large a portion of the subsistence of the Indians. For the two former, the treaty specially provides; the mountain ridges and adjacent valleys furnished the game, the fishery is designated by name, and only the fields (where every season the scattered bands gathered to the harvest of the wo-kus, camus, eppos, and other roots and seeds) were left in doubt; though even this point becomes clear, if a thorough knowledge of the topography of the territory is applied to the treaty.

Klamath Boundary Commission Report, S. Doc. No. 93, *supra* at 6, 7 (Stip., Ex. D).

The Boundary Commission thus determined that the excluded lands had in fact been included within the original Treaty Reservation for the very purpose of meeting the Tribe's subsistence hunting and fishing needs. One of the Tribe's primary subsistence fishing locations recognized by the Boundary Commission was Ish tish e wax Creek which lies within the excluded lands.

> In the spring the "little fisn" (small red suckers) enter this Creek from the river in countless numbers, when the Indians, gathered not only from the reservation but from California, enter the narrow creek at the mouth, unite in line, and drive the fish up to the dam until they form (as eyewitnesses informed us) an almost solid mass. Then the men, women and children scoop them out in great quantities and split and cure them for winter subsistence.
>
> The ground tells its own tale and fully corroborates the Indians; the bottom of the dam shows the rocks water-worn by years with the annual repairs distinctly evident above, the large flat stones forming the floor of the small amphitheater are worn into ruts by countless feet, and deep holes by the fires used for drying for generations. . . .

Klamath Boundary Commission Report, S. Doc. No. 93, *supra* at 10 (Stip., Ex. D). The Boundary Commission concluded its report as follows:

> In conclusion, we respectfully submit that during all this long period of thirty-two years these Indians have exhibited a patient and unwavering confidence in the justice of the Government demanding the highest commendation.
>
> Believing themselves to be grievously wronged by the white settlements on land they considered secured to them by the solemn pledge of the Government *and from which their subsistence was largely drawn*, they yet endured all the aggravating conditions of these years, resisted all the allurements of the adjacent and kindred tribes during the exciting period of the Modoc War, and remained loyal and true.

Id. at 11 (emphasis added); S. Rep. No. 198, 59th Cong., 1st Sess. 5 (1906) (Stip., Ex. F).

Based on its consideration of the needs of the Indians and a thorough examination of the area in light of the description in the Treaty, the Boundary Commission concluded that approximately 617,000 acres had been excluded. As agreed in the stipulated facts, in arriving at the value of the land, the Boundary Commission examined only the character of the land itself, such as soil quality, amount and quantity of meadow and grazing lands, and amount and value of timber on the land (J.A. 12, Stip. 6). It did not take into account the value of hunting, fishing and gathering rights in arriving at its valuation of 86.36 cents per acre.

Following the Boundary Commission's report, Congress authorized the appointment of an inspector for negotiation of an agreement with the Tribe. Act of July 1,

1898, 30 Stat. 571 (J.A. 12, Stip. 7). The Inspector (James McLaughlin) made it plain to the Indians that the Commission had determined that the Reservation in fact included those lands which had been excluded by the erroneous survey and that his negotiations with them were premised upon the Commission's findings:

> I summarized briefly, what had been done in the premises up to our meeting in council and stated that the treaty line as determined by the boundary commission was the one recognized by the Department; that it had been accepted and approved by the proper officials of the government as the line contemplated in the treaty of 1864; that all their right, title and interest to lands outside the boundary commission line was ceded to the Government by their treaty of October 4, 1864, and that the negotiation we were entering upon was based upon the findings of said commission.

H.R. Doc. No. 156, 56th Cong., 2d Sess. 28 (1900) (Stip., Ex. E).

In his report to the Secretary of the Interior, McLaughlin concurred in the Boundary Commission's assessment of the Reservation's unsuitability for agriculture:

> The Klamath Reservation, with an altitude approximating 4,500 feet, is not adapted to agriculture, other than the growing of fodder . . . .
>
> There being frost in this section every month of the year, the cultivation of vegetables and cereals is not remunerative, and in fact not attempted as a paying venture, but there is no finer section in Oregon for stock-growing, and for the Klamaths to continue prosperous and become independent the stock industry should be fostered and encouraged as it is the only remunerative industry in this section of country at the present time.

H.R. Doc. No. 156, *supra* at 30 (Stip., Ex. E); S. Rep. No. 198, 59th Cong., 1st Sess. 11 (1906).

McLaughlin concurred in the Boundary Commission's valuation and thus likewise did not take into account the Tribe's hunting, fishing and gathering rights. H.R. Doc. No. 156, *supra* at 26-28.[2] Following a survey, the total acreage excluded was finally determined to be 621,824 acres. Based on the value determined by the Boundary Commission and the slightly revised acreage figure, McLaughlin negotiated an agreement in 1901 whereby, for money received, the Tribe transferred its title to the excluded lands to the United States. Not one word is said in the agreement about a surrender of hunting, fishing, gathering or trapping rights by the Tribe.

Article I of the 1901 agreement provided that the Indians:

> do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation . . . the tract of land ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

Article II of the agreement provided for compensation of $.86 36/100 per acre:

> In consideration of the land ceded, relinquished, and conveyed by Art. I of this agreement, and in full (sic) of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey . . .

Article IV of the cession agreement provided that:

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[2]McLaughlin's report states: "I further informed them that I had concluded to indorse the price fixed by the boundary commission, and therefore our negotiations only involved the question of what disposition was to be made of the proceeds." H.R. Doc. No. 156, *supra* at 28.

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

The cession agreement was ratified by the Act of June 21, 1906, 34 Stat. 367.

The legislative history of the 1906 Act quotes a report by the Commissioner of Indian Affairs stating "[t]here can be no doubt as to the title of these Indians to their reservation, including the lands excluded by erroneous survey." S. Rep. No. 198, 59th Cong., 1st Sess. 12 (1906) (Stip., Ex. F.). The Senate Report further quotes at length from the opinion of the United States Circuit Court in *C & O Land Co. v. Rankin*, 87 F. 532 (1898), wherein the court held that the United States' authority under the 1864 Treaty to dispose of Klamath Reservation lands is founded in the trust relationship rather than the power of eminent domain.[3]

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[3]Particular attention is called to the language of the proviso in the treaty by which the residence of the Indians therein provided for is to continue until otherwise directed by the President, and the contention is made that this language shows that the rights now held by the Indians are not the same rights originally held by them, but are new rights bottomed on the treaty, and, therefore, subsequent in time to the road grant * * * The treaty could not confer a new right unless it conferred something in addition to what the Indians already possessed. Whatever is within the rights originally held by the Indians has been continuous with them. Equity is not concerned with the form of the proviso in this case. In its purpose and intent it is a reservation in its terms; the right of occupancy was not granted to these Indians. It was withheld by them. Furthermore, I am of the opinion that the words "until otherwise directed by the President" did not have the ef-

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Despite early land pressures from white settlers, of the 621,824 acres erroneously excluded from the survey of the Klamath Reservation, at the time of the negotiation process, only 62,361 acres had been entered. Of this amount, the Oregon Central Military Wagon Road Company had filed upon 31,000 acres and the State of Oregon upon 24,281 acres. Only 7,080 acres, or slightly over one percent, had been taken up by settlers under the homestead, preemption, and timber-culture acts. S. Rep. No. 198, *supra* at 8 (Stip., Ex. F); H.R. Doc. No. 156, *supra* at 10 (Stip., Ex. E). Following the 1901 agreement, virtually all of the ceded lands were immediately closed to entry and placed in either national forests or parks (J.A. 13-14, Stip. 14).

In 1969, the Indian Claims Commission awarded the Tribe $4,152,992.80 as additional compensation for the

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(Continued from previous page)

> fect attributed to them by the complainant. The treaty provides that Congress may hereafter permit the sale of these lands if the prosperity of the Indians will be thereby advanced. The relation of the Indians to the United States is shown to be that of dependents. They submit to the control and guardianship of the Government, and this right of sale can only be upon a consideration moving to the Indians. There can be no sale as of a property right in the United States, and the power of sale and the right of the President to direct a removal of the Indians in pursuance of its policy is manifestly the exercise of a trust power by the United States. These powers are not the exercise of proprietary rights by the United States, but the performance of a duty which it has assumed. The President can only direct the removal of these Indians in their interest. The right provided for as to this is not a limitation of the right of occupancy theretofore enjoyed by them, but a provision to make effective the authority to dispose of that right when the United States, acting in their behalf, determines that it is to their advantage that such interest should be sold.
>
> S. Rep. No. 198, *supra* at 12.

ceded lands. The Commission considered only the value of grazing and timber harvesting and did not include tribal hunting and fishing rights in its award of compensation.

The parties have stipulated that the Tribe's hunting, fishing, gathering and trapping rights were crucial to the survival of the Klamath Tribe at the time of the Treaty, at the time of the 1901 agreement, at the time of the 1906 Act which ratified the 1901 agreement, and that they continue to be of great importance to the Klamath Tribe today (J.A.19, Stip. 43). It is further stipulated that Klamath Indians have continued to hunt and fish on the ceded lands from the time of cession to the present without regard for state regulation (J.A. 14, Stip. 20), and that while the State generally asserted jurisdiction over Indian hunting and fishing outside the Reservation boundaries, the parties are unaware of any particular assertion of jurisdiction within the ceded area (J.A. 15, Stip. 22).

In 1954 Congress terminated for most purposes the trust relationship between the United States and the Klamath Tribe. Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564. The Act provided for the sale of the remainder of the Tribe's Treaty Reservation and the distribution of the proceeds among tribal members. Section 14 of the 1954 Act, 25 U.S.C. § 564m, provided that the Act "shall not abrogate any fishing rights or privileges of the Tribe or the members thereof enjoyed under Federal treaty." In 1958 Congress amended the Termination Act to provide for the acquisition of the tribal forest lands by the Secretary of Agriculture and the marshlands by the Secretary of the Interior. 72 Stat. 816, 25 U.S.C. § 564w-1. Pursuant to the Termination Act, as amended, the vast majority of the lands were purchased by the United States and placed in the Winema National Forest.

SUMMARY OF ARGUMENT

Prior to the 1864 Treaty between the Klamath Tribe and the United States, the Tribe had the right to hunt and fish on 22 million acres of aboriginal territory. In the Treaty, the Tribe reserved the right to hunt and fish within a 1.9 million-acre reservation, including those areas excluded from the marked boundary by subsequent erroneous survey. The congressional commission investigating the survey concluded that the excluded lands were in fact included within the Reservation because: 1) the Reservation's purpose was to provide a large enough area to meet the Indians' subsistence needs through hunting, fishing and gathering, as the climate was too severe for agriculture; and 2) the Indians had specifically bargained with the United States' for inclusion of the lands within the Reservation precisely because of their immense hunting, fishing and gathering importance to the Tribe.

Fully aware of these facts, the United States negotiated an agreement for cession of the excluded lands that contained absolutely no mention of these important tribal rights. Article IV of the agreement did, however, contain a general provision preserving those rights under existing treaties that were consistent with the cession. The congressional commission appraised the land only on the basis of its market value and the Tribe was not compensated for the loss of its hunting and fishing rights. At the time of cession, only one percent of the lands had been entered for settlement. Immediately after the cession agreement, and before ratification, virtually all of the lands were withdrawn from entry and placed in national forests or parks.

The legislative history and surrounding circumstances of the cession agreement show plainly that Congress' sole purpose was to benefit the Tribe by honoring the United States' treaty obligations. The 1906 Senate Committee Report quotes a federal court opinion ruling that the government's power under the 1864 Treaty to dispose of Klamath Treaty Reservation lands arises from the trust relationship and not the United States' sovereign power of eminent domain.

Under these circumstances, it is certain that Congress intended only to limit the Tribe's rights to hunt and fish to the degree necessary to accommodate the changed circumstances brought about by placement of the lands into national forests. A total taking away was not necessary nor was it intended. This rationale lies at the heart of this Court's ruling in *United States v. Winans,* 198 U.S. 371 (1905), a leading case also upholding off-reservation fishing rights, and is fully applicable here. Article IV of the cession agreement, preserving consistent treaty rights, confirms this congressional purpose. Thus, while the cession necessarily resulted in the loss of *exclusive* tribal rights to hunt and fish within the ceded area, it did not result in the loss of the compensable right to hunt and fish free of state regulation. Tribal rights have further been accommodated to the changed circumstances by the fact that the Tribe claims no rights appurtenant to the land itself, *i.e.*, the Tribe does not assert the right to enter on private lands over the objection of the landowner.

The cession was not effectuated for the purpose of opening lands to settlement by non-Indians. Rather, the exercise of the rights at issue is compatible with the status of the land. Cases relied on by the State, holding that

tribal rights to hunt and fish are automatically abrogated in areas of diminished reservations that were ceded for the purpose of opening the reservations for non-Indian settlement, are distinguishable based on both the purpose of the cession and the nature of the right asserted.

This Court has held that statutes purportedly affecting treaty hunting and fishing rights should be construed in light of their overall purpose. Here, as in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), Congress' overall purpose was to settle finally an obligation to the Tribe, not to give rise to additional claims for the taking of compensable treaty property rights. A construction of the 1906 Act resulting in a loss of the rights would conflict with Congress' clear purpose of benefiting the Tribe and honoring Treaty obligations. Moreover, because Congress was unquestionably acting in its role as trustee for the Tribe, the confiscatory results urged by the State are precluded. *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980) (Congress may either act as a trustee for the Tribe's benefit or it may act as a sovereign and take tribal property, but it may not act in both capacities simultaneously). And, because Congress is the trustee of tribal property, this Court has held that congressional expressions of intent to abrogate treaty hunting and fishing rights must be clear and unambiguous; "backhanded" or indirect abrogations are not favored. *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968).

The canons of construction consistently applied by this Court to statutes ratifying agreements with Indians require that they not be construed to the Indians' prejudice. Rather, they are to be interpreted liberally in the Indians' favor as the Indians would have understood

in light of the surrounding circumstances. *Antoine v. Washington,* 420 U.S. 194 (1975). Here, the Tribe knew that the boundary commission and the inspector who negotiated the agreement were aware of, and had relied on, the importance of the ceded areas to the Tribe for hunting and fishing.

The Tribe also knew that the appraisal of the land's value was detailed and did not include hunting and fishing rights. Moreover, the value had never been the subject of negotiation with the United States—Inspector McLaughlin simply informed the Tribe that he had accepted the Boundary Commission's value and that their negotiations were limited to the issue of how the Tribe would utilize the proceeds. Finally, they were aware that the agreement contained a provision preserving consistent treaty rights and that virtually all of the land to be ceded was unentered, unenclosed forest that was useful almost exclusively for hunting, fishing and gathering (other than speculative timber production). Under these circumstances, the Klamaths would not have understood the agreement to extinguish their hunting and fishing rights in these important tribal areas.

Congress has been consistently solicitous of the Klamaths' hunting and fishing rights. The 1864 Treaty specifically preserves the rights as does the 1954 Klamath Termination Act. The vast majority of the 1864 Treaty Reservation, both those lands ceded in 1906 and those sold pursuant to the 1954 Termination Act, are now in national forests. Most of the remainder is private commercial forest land on which hunting and fishing is permitted. It would be anomalous to permit the Klamaths to hunt and fish on that portion of their Treaty Reservation sold at

termination but to deny them that right on the smaller ceded portion of the same Treaty Reservation, consisting of similar forest lands, on the strength of an agreement that does not even mention hunting and fishing rights.

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ARGUMENT

A. In Ratifying The 1901 Cession Agreement, Congress Intended To Limit Klamath Indian Treaty Rights Only To The Extent Necessary To Accommodate The Changed Circumstances Brought About By Placement Of The Ceded Lands In National Forests.

The analytical framework for this case was set forth by the Court in *United States v. Winans,* 198 U.S. 371 (1905), which involved tribal hunting and fishing rights on ceded lands. In holding that Yakima Indian treaty rights to hunt and fish survived private acquisition in fee patent of the Indians' usual and accustomed fishing places, this Court stated:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose.

198 U.S. at 381.

Before the Treaty of 1864, the Klamath Indians possessed the unquestioned right to hunt and fish over 22 million acres of territory. Following the Treaty, the purpose of which was to provide a home for the Tribe large enough to permit them to be self-sufficient primarily through hunting, fishing and gathering,[4] the Tribe possessed the *exclusive* right to hunt and fish within the Reservation. The right to hunt and fish free of state regulation was only part of the exclusive rights held by the Tribe before the cession. Like the Yakima Indians in *Winans,* the rights asserted here were part of larger rights "which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381. Indeed, the areas at issue here were initially included within the Reservation's boundaries at the Indians' insistence because of their tremendous importance to the Tribe for hunting and fishing.

Congress was thoroughly apprised of these circumstances in 1906 through the reports of the Klamath Boundary Commission, the inspector who negotiated the agreement and the reports of the Department of the Interior. In the years between the 1901 Agreement and the 1906 Act ratifying it, Congress had closed virtually all of the ceded lands to entry and placed them within national forests in

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[4]In United States v. Adair, 478 F. Supp. 336, 345 (D. Or. 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied,* — U.S. — (1984), the district court held that "the principal purpose of the [1864 Klamath] Treaty was to provide an area so they could continue to be self-sufficient." The district court further found that the Treaty's primary means of promoting tribal self-sufficiency was through protection of tribal hunting, fishing, trapping and gathering rights. Agriculture was found to be a secondary means. The Ninth Circuit concurred, 723 F.2d at 1409-10, see discussion *infra* at 39.

anticipation of ratification of the cession agreement. Moreover, Congress' primary purpose was to benefit the Tribe by honoring a treaty obligation to rectify a survey error.

Thus, while the Indians' treaty rights had to be accommodated to the changed status of the ceded lands, no "taking away" was necessary nor was it intended. This congressional scheme is confirmed by the provisions of Article IV of the cession agreement providing for the preservation of consistent treaty rights.

1. Article IV Of The Cession Agreement Reflects Congressional Intent To Preserve Compatible Treaty Rights.

Article IV of the 1901 Agreement provides:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provision of this agreement.

The right asserted by the Tribe here is not inconsistent with the property interest conveyed by the Tribe nor is it incompatible with the purposes of the cession.

a. A Right To Hunt And Fish Free Of State Regulation May Exist Apart From An Ownership Or Possessory Interest In The Land.

The Tribe asserts no continuing proprietary interest in the lands within the ceded area, *i.e.,* a right that is appurtenant to the land itself. The Tribe asserts no right within the ceded area to hunt and fish on private lands over the landowner's objection. Thus, because the right is not a servitude on the land, it is consistent with the

Tribe's cession of full right, title and interest in the land itself.[5] Congress has specifically determined that rights of possession and occupancy are not prerequisite to the continued existence of Klamath treaty rights to hunt, fish, gather and trap. In the Klamath Termination Act, Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564, Congress terminated the remaining portion of the Tribe's post-cession Reservation. However, § 14(b) of the Act, 25 U.S.C. § 564m(b), provided that notwithstanding termination of

[5]The common law has long recognized the right to take wild animals and fish on land owned by another, since such creatures were the property of no one. Early lawmakers in this country eschewed the notion that individual landowners hold absolute ownership of fish and game located on their property in favor of the view expressed in Blackstone's *Commentaries* that "by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody . . ." 2 W. Blackstone, *Commentaries on the Laws of England*, at 411 (1st ed. 1766) (footnote omitted). In Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976), the author notes that "[i]n America, the winner of the debate was Blackstone. The American belief in common rights to wildlife was manifested in doctrines that rejected landowner claims of special privilege and allowed free taking even on private lands." *Id.* at 712. In the constitutions of Pennsylvania and Vermont, the hunters' right to enter all unenclosed private land was recognized. Pa. Const. § 43 (1776); Vt. Const. § 39 (1777). Id. at 713 n.77. This general understanding was explained by Justice Holmes in McKee v. Gratz, 260 U.S. 127, 136 (1922).

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country . . .

This right to hunt on private land is to be distinguished from a *profit a prendre* which is an enforceable right to hunt or fish on the land and would be an interest in land in the common law. Minnesota Valley Gun Club v. Northline Corp., 290 N.W. 222 (Minn. 1940).

the Reservation's status as a federal Indian Reservation and sale of a portion of its lands, "[n]othing in [this Act] shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under federal treaty." *See Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Kimball I); *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (Kimball II): "The Court in *Kimball I* did not base its decision that withdrawn tribal members retained their treaty rights to hunt and fish upon any rights to tribal property. On the contrary, the court expressly recognized that withdrawn members relinquished all interests in tribal property."[6]

This Court has also recognized that treaty rights to hunt and fish may exist apart from an interest in the land itself. In *Antoine v. Washington*, 420 U.S. 194 (1975), the Court upheld Indian rights to hunt and fish free of state regulation on land to which the Tribe had ceded all right, title and interest and which was thereafter opened to settlement by non-Indians. In *Antoine* two Indians were convicted in state court of the offenses of hunting and possession of deer during closed season in violation of state law. The "crimes" occurred on unallotted non-Indian land which had been within the boundaries of the Colville Indian Reservation prior to diminishment. The cession agreement between the United States and the Tribe pro-

[6]With respect to the Klamath Reservation lands sold pursuant to the 1954 Termination Act (the lands at issue in *Kimball I*) the United States Court of Claims had previously found that "[t]he Government took full title, without restriction, and will pay full fair market value as of the taking. . ." Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 690; 436 F.2d 1008, 1018 (Ct. Cl. 1971).

vided that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged." 420 U.S. at 196 (footnote omitted). Noting that there was no issue of any *right* to hunt without the permission of the private landowners, 420 U.S. at 207, n. 11, this Court held that the application of state law to tribal hunting and fishing rights was precluded. Thus, *Antoine* establishes firmly that the treaty right to hunt and fish free from state regulation may exist on lands in which the Indians have no right, title, and interest.

A number of lower courts have likewise recognized that Indian hunting and fishing rights are not necessarily appurtenant to the land. *See Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974) (rejecting state's argument that Tribe retained only proprietary right to hunt and fish off reservation but necessarily surrendered regulatory right, *i.e.,* to hunt and fish free of state regulation); *Lac Courte Oreilles Band v. Voigt,* 700 F.2d 341, 352 (7th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 53 (1983) (treaty hunting and fishing rights on ceded public lands in northern third of Wisconsin "not dependent on either the Indians' title or right to permanently occupy the land in which it was to be exercised."); *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809, 823 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 707 (1984) (treaty rights to hunt and fish free of state regulation on lands taken by United States for dam and reservoir purposes "are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.").

b. Tribal Retention Of Hunting And Fishing Rights Is Compatible With The Purposes Of The Cession And The Status Of The Ceded Lands.

The legislative history and surrounding circumstances of the 1906 Act show a clear congressional purpose to honor the United States' obligations under the 1864 Treaty. While the purpose of the 1906 Act *was* to honor federal treaty obligations and benefit the Indians, one of its purposes *was not,* like the majority of other turn-of-the-century cession agreements, to open the Reservation for entry and settlement by non-Indians. The 1906 Senate Committee Report quotes the Secretary of the Interior's transmittal letter, noting that only 7,080 acres (slightly over one percent) had been taken up by settlers. S. Rep. No. 198, *supra* at 8. Moreover, prior to the time Congress ratified the 1901 Agreement, it had already withdrawn virtually all of the ceded lands from entry and placed them in national forests or Crater Lake National Park (J.A. 13-14, Stip. 14-18).

Retention of treaty rights to hunt, fish, gather and trap on unsettled public forest lands or private forest lands with the landowner's permission is consistent with the Tribe's cession of title and exclusive rights of occupancy. *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (Kimball I) (terminated Klamath Indians retain non-exclusive rights to hunt and fish free of state regulation on former reservation lands now mostly within national forest). *United States v. Adair,* 478 F. Supp. 336, 346, n. 5 (D. Or. 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied,* — U.S. — (1984) ("Government's current uses of the Marsh and forests

of the [Klamath] Reservation are consistent with the Indians' claims [to sufficient water for game and fish resources] in this action . . ."; *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809, 817-18 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 707 (1984) (Government's use of lands for dam and reservoir purposes "not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to permit settlement by non-Indians.").

Indeed, numerous Indian tribes retained rights to hunt and fish even on lands ceded for the purpose of non-Indian settlement as long as those lands remained public lands of the United States, or as long as they remained unsettled.[7] The Supreme Courts of Montana and Idaho have held, as has a federal district court, that such treaty rights preclude state regulation of Indian hunting and fishing on ceded lands now in national forests. *State v. Stasso,* 172 Mont. 242, 563 P.2d 562 (Mont. 1977) (Treaty with Flatheads, 12 Stat. 975); *State v. Tinno,* 94 Idaho 759, 497 P.2d 1386 (Idaho 1977) (Treaty with Eastern Shoshoni, 15 Stat. 673); *State v. Arthur,* 261 P.2d 135 (Idaho 1953),

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[7]*See, e.g.,* Treaty with the Cherokee (1798), 7 Stat. 62; Treaty with the Koskaskia (1803), 7 Stat. 78; Treaty with the Sauk and Foxes (1804), 7 Stat. 84; Treaty with the Piankashaw (1805), 7 Stat. 100; Treaty with the Ottawa (1807), 7 Stat. 105; Treaty with the Chippewa (1808), 7 Stat. 112; Treaty with the Wyandot (1817), 7 Stat. 160; Treaty with the Ottawa (1821), 7 Stat. 218; Treaty with the Miami (1826), 7 Stat. 300; Treaty with the Potowatomi (1832), 7 Stat. 378; Treaty with the Makah (1855), 12 Stat. 939; Treaty with the Walla Walla (1855), 12 Stat. 945; Treaty with the Yakima (1855), 12 Stat. 951; Treaty with the Nez Perce (1855), 12 Stat. 957; Treaty with the Flatheads (1855), 12 Stat. 975; Treaty with the Navajo (1868), 15 Stat. 667; Treaty with the Shoshoni (1868), 15 Stat. 673.

cert. denied 347 U.S. 937 (1954) (Treaty with Nez Perce, 12 Stat. 957); *Confederated Tribes of the Umatilla Indian Reservation v. Maison,* 262 F. Supp. 871 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes,* 382 F.2d 1013 (9th Cir. 1967) (Treaty with the Walla Walla, 12 Stat. 945). These cases demonstrate that Indian hunting and fishing free from State regulation on national forest lands is not a novel proposition.

2. Neither The Eighth Circuit's Ruling In Red Lake Nor This Court's Ruling In Rosebud Sioux Tribe v. Kneip, Is Inconsistent With The Ruling Below.

The state relies on *United States v. Minnesota,* 466 F. Supp. 1382 (D. Minn. 1979); *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota,* 614 F.2d 1161 (8th Cir. 1980); *cert. denied,* 449 U.S. 905 (1980) *(Red Lake)* for the proposition that a cession of Indian title and diminishment of reservation boundaries necessarily results in abrogation of hunting and fishing rights (State's Brief at 24-26). However, *Red Lake* is distinguishable from this case in several important respects. First, *Red Lake* involved cessions of tribal land under general authority granted by the Nelson Act, the purpose of which was "to restore [Indian Reservation land] to the public domain and open it to settlement by whites." 466 F. Supp. at 1387. In contrast, the Klamath cession was accomplished pursuant to a special act of Congress, the purpose of which was to finally settle a boundary dispute and honor treaty obligations. Opening the lands to settlement was

clearly not a purpose of the 1901 Klamath cession; the lands were immediately placed in national forests or parks.

Secondly, the *Red Lake* court made no distinction between the right to hunt and fish free of state regulation (a regulatory right), and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire *Red Lake* analysis is premised on the characterization of the right asserted by the Indians as an interest in property, *i.e.*, appurtenant to the land itself: "These rights are mere incidents of Indian title . . ." 466 F. Supp. at 1385.[8] As the Tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself. In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit declined to follow its own *Red Lake* decision based upon that very distinction:

> The district court initially concluded that a finding of abrogation was supported by the plain language of the Fort Randall and Big Bend Acts. The court relied on *Red Lake* . . . to state that "[i]t has been held that statutes which remove 'all right, title and interest' of a tribe in certain land operate to extinguish hunting and fishing rights in the land."

[8]In *Red Lake*, the Tribe and the United States likewise made no such distinctions in asserting their claims. They simply argued that the Red Lake Band retained its treaty rights unaffected by the cession and opening of the Reservation for settlement.

> Then citing statutory language in the Fort Randall Act (section 1) referring to the "settlement of all claims, rights and demands" arising from the project's construction, and in the Big Bend Act (section 1(a)) referring to a taking of the Tribe's "entire interest" in the specified land, the court concluded that these provisions alone "may be * * * sufficient indicia of congressional intent to extinguish treaty hunting and fishing rights of the Tribe within the taken area." We cannot agree.
> . . . .)
> . . . [the district court] . . . failed to recognize that the Tribe's treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation. . . .

711 F.2d at 822-23 (citations and footnote omitted, emphasis in original).[9]

There is a substantial difference between asserting a retained property right to hunt and fish over the objec-

[9]The *Lower Brule* court also relied on the fact that the congressional taking acts there had not resulted in a diminishment of the Reservation boundaries as they had in *Red Lake*. Here, of course, the 1901 cession did result in diminishment of the Klamath boundaries. The Eighth Circuit makes it plain, however, that diminishment is the determinative inquiry only in the absence of federal law preserving the rights:

> If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land *absent federal law preserving the Indians' hunting and fishing rights.*

711 F.2d at 815, *citing* Menominee Tribe v. United States, 391 U.S. 404 (1968) (emphasis added). Here, because the Reservation was not opened for settlement, Article IV preserves the Tribe's rights as does the rule of *Menominee Tribe, supra*, that Treaty rights will not be abrogated by implication.

tion of the landowner on land which has been opened for settlement, as was the case in *Red Lake,* and asserting a right to hunt and fish free of state regulation on national forest lands or private forest lands with the consent of the landowners, as is the case here. *See Antoine v. Washington, supra,* 420 U.S. at 207, n. 11. The rights asserted by the Tribe here are consistent with the 1901 cession and are therefore preserved by Article IV of the agreement.

The State argues, however, that this Court's decision in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), indicates that Article IV has no application in this case (Br. 33-34). Each cession agreement in *Rosebud,* like the Klamath cession agreement, contained a provision preserving any treaty right not inconsistent with the provisions of the agreement. In *Rosebud,* the Tribe had argued that the treaty right to the reservation boundary as described in the Treaty was consistent with the purpose of the cession and therefore was preserved by Article V, the provision similar to Article IV of the Klamath cession agreement. The Indians' argument in *Rosebud* was rejected and because this Court's opinion did not mention Article V, the State concludes therefrom that Article IV has no real significance in this case.

However, the *Rosebud* Court found that one of the very purposes of the Rosebud cession agreement was to diminish the Reservation boundary. Thus, by that fact alone, Article V could not work to preserve the Rosebud Indians' right to the Treaty-described reservation boundary. In this case, the pre-existing treaty right claimed to be preserved by Article IV is not a *sine qua non* of the

cession agreement.[10] The Klamath Tribe concedes that its Reservation was diminished by the 1906 Act. Thus, the question here is, assuming diminishment, whether the survival of tribal rights to hunt and fish is consistent with this cession.

Rosebud establishes that the question of diminishment is separate from the question of whether, notwithstanding diminishment, any beneficial interest has been retained by the Indians. Citing the lower court's ruling in *Rosebud,* this Court made clear that "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." 430 U.S. at 601, n. 24 citing *Rosebud,* 521 F.2d 87, 102 (9th Cir. 1975).[11]

Rosebud refutes the State's argument that the cession of all right, title, and interest to the land is necessarily inconsistent with a right to be free from state regulation

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[10]Only after the purpose of the cession has been determined can Article IV have any meaning. Thus, Article IV does not aid in determining the central purpose of the cession, but once that purpose is determined, it does operate to preserve rights consistent with that purpose.

[11]*Rosebud* also relied on Ash Sheep Co. v. United States, 252 U.S. 159 (1920), where it was held that notwithstanding that the Indians had relinquished their possesory right to a portion of their reservation, any benefits which might be derived from the use of the land belonged to the beneficiaries and not the trustee until the lands were actually sold. Therefore, the lands were not public lands for purposes of sheep grazing. The cession agreement in *Ash Sheep* was in all material respects similar to that in *Rosebud.*

while hunting and fishing on the land.[12] The retention of such hunting and fishing rights does not detract at all from the property interest conveyed, *i.e.*, all right, title and interest to the land. Article IV therefore preserves those rights.

B. The 1906 Act Should Be Construed Consistently With Its Overall Purpose Of Honoring Treaty Rights And Finally Settling A Boundary Dispute.

The legislative history and surrounding circumstances of the 1906 Act establish that the overall congressional purpose was to benefit the Indians by honoring the United States' treaty obligations.[13] In *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), this Court looked to the overall purpose of the 1954 Menominee Termination Act

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[12]State v. Hero, 282 N.W.2d 70 (S.D. 1979), upon which the States relies, is inapplicable here. While *Hero* involved the question of whether the State could regulate Indian hunting and fishing within the diminished Rosebud Reservation, the purpose of the cession agreement at issue there was to open the land to non-Indian settlement. The land itself was viewed as being bereft of fish or game. 282 N.W.2d at 71, citing 45 Cong. Rec. 1068 (1910). Moreover, the Indians in *Hero* asserted a continuing proprietary interest on the private land as well as the right to hunt free of state regulation, and the court in *Hero* thus made no distinction between the proprietary and jurisdictional aspects of the right.

[13]This singular beneficent purpose is to be distinguished from the purposes of the congressional acts that opened Indian reservations for non-Indian settlement. *See, e.g., Red Lake, supra,* 466 F. Supp. at 1387: "The legislative history of the 1889 Nelson Act . . . makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites." (Citation omitted).

and held that a construction of the Act resulting in an indirect abrogation of a compensable treaty right to hunt and fish free of state regulation would be inconsistent with the overall congressional purpose of settling the government's financial obligations to the Indians:

> We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.

(footnotes omitted), *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Court will avoid a construction that would deprive property owners of a remedy for the taking of property).

In this case, as in *Menominee*, the overall congressional purpose was to finally settle a boundary dispute by paying the Tribe for what it was giving up. Congress was aware that Treaty hunting and fishing rights were compensable property rights,[14] yet the Government's detailed

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[14]See *Menominee, supra,* 391 U.S. at 413 and n. 15, where the Court notes that in the hearings on the Klamath Termination bill, Senator Watkins expressed the view that perhaps the Government should "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. *See also* United States v. Sioux Nation of Indians, 448 U.S. 371, 423 and n. 33 (1980) (United States' obligation to provide rations for the Sioux was *quid pro quo* for deprivation of hunting rights. " '[T]he Government committed two wrongs; first, it deprived the Sioux of their livelihood [*i.e.*, hunting rights]; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.' " Quoting S. Rep. No. 93-863, p. 2 (1974); Hynes v. Grimes Packing Co., 337 U.S. 86, 105 (1949). *See also* Treaty

(Continued on following page)

appraisal made no mention of them. The Senate Committee's quotation of the federal court opinion to the effect that "this right of sale can only be upon a consideration moving to the Indians. . . ." illustrates the Congressional purpose to pay the Indians for what was being taken and not to create new claims against the Government. S. Rep. No. 198, *supra* at 12.

The 1906 Act should also be construed consistently with the overall purpose of benefiting the Tribe by honoring Treaty obligations. The legislative history shows that Congress sought to further the self-sufficiency purpose of the Reservation by effectuating the cession. S. Rep. No. 198, *supra* at 18. Construing the Act to deprive the Indians of what Congress knew to be their primary source of subsistence would be inconsistent with the purpose of promoting tribal self-sufficiency.

Finally, the legislative history and surrounding circumstances demonstrate conclusively that Congress was acting in its capacity as trustee when it authorized and ratified the 1901 cession agreement. That Congress specifically recognized it was acting in its trustee's role, as opposed to its sovereign's role, is demonstrated by the

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with the Western Shoshoni, 18 Stat. 689 (1863), art. 7 (20-year annunity of $5,000 per year for driving away and destruction of game); Treaty with the Winnebago, 9 Stat. 878 (1846) ($40,000 paid for release of hunting privileges); 13 Stat. 324 (1864) (authorizing President to pay $5,000 to Indians of middle Oregon to relinquish their off-reservation hunting, fishing, gathering and pasturing rights); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) ($15 million for destruction of usual and accustomed off-reservation fishing places); F. Cohen, *Handbook of Federal Indian Law* 468 (1982 ed.).

Senate Committee's reliance on the opinion in *C & O Land Co. v. Rankin:* "These powers are not the exercise of proproprietary rights by the United States, but the performance of a duty which it has assumed." S. Rep. No. 198, *supra,* at 12. A construction of the 1906 Act resulting in abrogation of the rights would be inconsistent with the Act's overall beneficent purpose and Congress' role as trustee. This is particularly true in this instance where the importance of hunting and fishing in the ceded area was acknowledged and relied upon to determine that there had in fact been a mistake in the survey.

This Court has recognized and given effect to the fundamental inconsistency between Congress' role as trustee and its role as sovereign, exercising its power of eminent domain to take Indian property. Thus, the Court has stated that when Congress acts with regard to Indian people, it acts in either one role or the other but may not act in both simultaneously:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians exercising its plenary powers over the Indians and their property, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980) (quoting Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)).

It is certain that the 1901 agreement was undertaken in the United States' capacity as guardian and manager of

the Indians' resources. This precludes the confiscatory construction of the 1906 Act which would result in the loss of a substantial portion of the Indians' primary means of subsistence without so much as a passing mention and without payment of compensation. As this Court reasoned in *Sioux Indian Nation* (quoting Justice Cardozo in *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937)), Congress was wearing its trustee's hat in managing the Klamaths' affairs in 1906 and courts will not imply conduct inconsistent with that trustee's role: "'Spoilation is not management.'" 448 U.S. at 408.

C. The 1906 Act Should Be Construed To Avoid An Indirect Abrogation Of Treaty Property Rights.

Because the United States stands in the role of trustee to the Indians and their property and thus posseses plenary power over tribal property, this Court has repeatedly stated that any congressional attempt to extinguish tribal property rights must be clear and unambiguous. Congress may act to abrogate treaty property rights, but it must do so in a manner that leaves no doubt as to its intent. This Court has steadfastly refused to infer a congressional intent to terminate treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (general application of state law would result in impermissible "backhanded" extinguishment of treaty rights to hunt and fish free of state law); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 690 (1979) ("Absent express statutory language, we have been extremely reluctant to find Congressional abrogation of treaty rights . . ."); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353 (1941)

("clear and plain" congressional action required to support asserted taking of aboriginal title); *see* F. Cohen, *Handbook of Federal Indian Law* 467-68 (1982 ed.); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Cal. L. Rev. 601 (1975).

In this case, neither the 1906 Act nor its legislative history alludes, however indirectly, to any abrogation of treaty rights to hunt and fish. This result could only be accomplished through an implied extinguishment.[15] The

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[15]The Tribe does not argue here that an abrogation of treaty rights to hunt and fish free of state regulation may only be accomplished by *express* language. Where the language of the statute is not express, however, the intent to abrogate must still, at the very least, be *clear* from the legislative history and surrounding circumstances. Thus, where a reservation is diminished and the ceded lands are opened to non-Indian settlement, it might well be that the totality of circumstances would reveal a clear Congressional intent to abrogate. However, where a reservation is diminished but the ceded lands are not opened for settlement and retain their status as forests in public ownership, diminishment in and of itself does not demonstrate a clear Congressional intent to abrogate. Thus, like the question of diminishment itself, the survival of treaty rights to hunt and fish within the ceded areas of a diminished reservation depends in each case upon an examination of the cessation act, its legislative history and the surrounding circumstances. See Solem v. Bartlett, — U.S. —, 79 L.Fd.2d 443, 451 (1984):

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. . . . In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers. (citations and footnotes omitted).

Court should avoid a construction that would result in a repeal by implication. *Morton v. Mancari,* 417 U.S. 535 (1974). The Tribe has demonstrated that the Treaty right to hunt and fish free of state regulation is consistent with both the technical property interest conveyed and the purposes of the cession. There is no irreconcilable conflict or "manifest incompatibility" between the 1864 Treaty right and the 1906 Cession Act. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468-470 (1982). Under these circumstances, a repeal of the Treaty right may not be implied.

The state argues, however, that diminishment alone is a sufficiently clear indication of congressional intent to abrogate treaty rights. This argument is necessarily premised on the general assumption that the retention of any treaty rights presents an irreconcilable conflict with the diminished status of the ceded lands. However, Congress has diminished Indian reservations for purposes other than settlement by non-Indians. Thus, as this case illustrates, the existence of irreconcilable conflict will depend on the history and circumstances of each diminishment.

For this reason, the authority relied on by the State simply has no application. This case assumes diminishment and presents the question whether, under specific and unique circumstances, a particular treaty-protected *property* right has survived. None of this Court's cases relied on by the State address that issue except *Menominee Tribe, supra.* In that case, this Court held that the total diminishment of the entire Reservation (termination) and the *express* application of state law were not intended to extinguish the compensable property right to hunt and fish free of state regulation. This directly refutes the

State's assertion that this Court must have assumed in *Mattz v. Arnett,* 412 U.S. 481 (1973), that the "treaty right to hunt and fish would have been extinguished if the reservation had been terminated." (Br. 22-23).[16]

D. The 1906 Act Should Not Be Construed To The Indians' Prejudice: Ambiguities Should Be Resolved In Their Favor As They Would Have Understood.

This Court has repeatedly ruled that treaties and agreements with Indian tribes are to be broadly construed

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[16]The State has consistently misunderstood the effects of termination on Indian reservations. For example, at page 21 of its Brief the State argues that where the "Court has not upheld state regulation of an area, it has reached this conclusion because the area had not been removed from reservation boundaries." In its Petition for Certiorari, it mistakenly asserted that, after termination, the lands of the Klamath Reservation remained subject to the Indians' right of occupancy (Petition at 9) and that the lands of the Menominee Reservation remained within reservation boundaries (Petition at 11).

In fact, however, just the opposite is true. The impact of the Termination Acts on the status of the Menominee and Klamath Reservations was much more comprehensive than the impact of the 1901 cession at issue here or other cession agreements construed in the "diminishment" cases. *See, e.g.,* DeCoteau v. District County Court, 420 U.S. 425 (1975). While turn-of-the-century cession agreements sometimes diminished reservation boundaries by removing the Indian country status of a portion of a reservation, the termination acts of the 1950's completely eliminated entire Indian reservations and brought to an end most aspects of the federal-tribal relationship. *See generally* F. Cohen, *Handbook of Federal Indian Law* 815-16 (1982 ed.). Such was the case at both Klamath and Menominee: the Indian country status of both reservations was ended. The lands of the Klamath Reservation were sold outright. The lands of the Menominee Reservation were transferred to a private corporation chartered under Wisconsin law. Moreover, each Termination Act contained express language making the laws of the state applicable to the Tribe and its members, 25 U.S.C. §§ 564(q) and 899. In contrast, the 1901 Cession Agreement contained no comparable provision.

in their favor as the Indians would have understood. In *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975), the Court stated the canon of construction applicable here:

> The canon of construction applied over a century and a half by this Court is that the wording of the treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. In *Choate v. Trapp, supra*, also a case involving a ratifying statute, the Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U.S. at 675, 56 L.Ed. 941.

(citations omitted), *see Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 676 (1979); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

The numerous congressional documents that comprise the legislative history of the 1906 Act show that the Indians understood that the lands to be ceded were indeed part of the Reservation to which their Treaty rights extended. S. Rep. No. 198, 59th Cong., 1st Sess. 17 (1906) (Stip., Ex. F). The United States Inspector emphasized to the Indians that these were their lands and that the negotiations were premised on the findings of the Boundary Commission; specific among which was that the lands had in fact been included within the Reservation precisely because of their hunting and fishing value to the Tribe. H.R. Doc. No. 156, *supra* at 28 (Stip., Ex. E).

At the time of the 1901 agreement, therefore, the Tribe was aware of the following: 1) that the excluded

lands were in fact within the Reservation and had been included specifically for their hunting, fishing and gathering value; 2) that both the Boundary Commission and Inspector were aware of and had relied on this; 3) that despite this awareness on the part of the government, the Boundary Commission's computation of the value of the lands (which McLaughlin adopted verbatim) did not include hunting and fishing rights; 4) that the agreement did not say one word about ceding hunting, fishing, trapping and gathering rights; 5) that the agreement included a provision specifically preserving treaty rights not inconsistent with the sale of this land; and 6) that virtually all of the excluded lands were unentered, unenclosed forest lands that were useful for little other than hunting, fishing and gathering (other than speculative value for timber production).

Under these circumstances, the Tribe would reasonably have believed that failure to mention these express Treaty rights could only result in their continuation. The Reservation was unsuitable for agriculture, S. Rep. No. 198, *supra* at 11; S. Doc. No. 93, supra at 6-7, and the Klamath Tribe was heavily dependent upon hunting, fishing and gathering at the time of the agreement (J.A. 19, Stip. 43). Moreover, tribal members continued their hunting and fishing activities on the ceded lands after their cession (J.A. 14, stip. 20). This indicates that the

Tribe understood its rights to be unaffected by the cession agreement.[17]

The fact that the 1901 agreement was reached during an era of allotment and assimilation does not alter the fact that the Indians were and have remained heavily dependent upon hunting and fishing (J.A. 19, Stip. 43); S. Doc. No. 93, *supra* at 11 (Stip., Ex. D). The record in this case establishes that while the government may have sought to foster "industrious pursuits" by the Klamaths, agriculture and grazing had not taken hold at the time of the agreement.[18] Indeed, it appears unlikely that agriculture ever

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[17]In *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 53 (1983), the Seventh Circuit relied upon a similar analysis to overturn the trial court's finding that "[h]ad the parties intended the 1854 treaty to continue to preserve those rights in the lands previously ceded . . . it is reasonable to believe they would have made it explicit in 1854." 700 F.2d at 363. The court held that failure to mention the rights in 1854 suggested that the Tribe believed their right to use the ceded lands to be secure and unaffected:

> Turning first to the Indian understanding of the treaty, the LCO band was heavily dependent on the exercise of their usufructuary activities throughout the ceded region at the time of the treaty negotiations. Even if some Indians contemplated turning to agriculture as a principal means of subsistence, there is no indication such a transition had been implemented to any extent at the time of the treaty. Second, the Indians in fact continued their hunting and fishing activities on the ceded territory long after their reservations were created pursuant to the 1854 treaty.

Id. at 364.

[18]*See, e.g.*, Boundary Commissioner's Report, quoted in State's Brief at 39: "One step further would assure their self-support . . ." *i.e.*, providing a few cows "as a start" for each family; *see also* Boundary Commissioner's Report, quoted *supra* at 3).

did take hold on the Klamath Reservation. In 1958 the Klamath Reservation comprised "861,125 acres consisting of 693,997 acres of commercial and noncommercial forests, 127,938 acres of open range, 23,421 acres of marsh, 14,524 acres of brush, barren or wasteland, and 1,245 acres of farmland." H.R. Rep. No. 2278, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong & Ad. News 3791, 3792.

To the degree that general statements by Indians that they "desire to give up the old customs of their fathers" (State's Brief at 40) are inconsistent with their express statements regarding the importance of hunting and fishing, that ambiguity must be resolved in favor of the Tribe. However, such statements are not necessarily inconsistent. The District Court in *United States v. Adair, supra*, 478 F. Supp. at 345, found the purposes of the Klamath Reservation to be dual, with self-sufficiency through hunting and fishing having primacy over agriculture. The Ninth Circuit affirmed, 723 F.2d at 1409, holding that "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." The *Adair* court further noted that at the time of the Treaty:

> The Government was probably aware that hunting and fishing held the greatest promise for sustaining the Klamath on their Reservation:
>
> > The land of the Modoc and Klamath Lake Indians is a high, cold plain, nearly on a level with the summit of the Sierra Nevada mountains, too frosty to raise cereal or roots with success, and fit only for grass. The country abounds in wild

> game and the lakes and streams in fish. The Indians make good living and raise a great many horses ....
>
> 1864 Report of the Commissioner of Indian Affairs 121.

723 F.2d at 1409, n. 15.

At the time of the cession, the Klamath Boundary Commission and Inspector McLaughlin certainly understood that the Reservation was unsuitable for agriculture and that the Indians depended heavily on hunting and fishing. It would simply be unfair for the United States, as trustee, to now say to the Tribe that what it really meant in 1906 was this: "Sell to us these forest lands upon which you depend heavily for your subsistence so that the United States may reap the income from timber production;[19] and while the lands will remain as forests, you may no longer hunt and fish upon them. We are sorry we forgot to mention that and that we neglected to pay you for the loss of your rights. We also regret that your Reservation is unsuitable for agriculture; but perhaps you can take up farming anyway." Such a construction of the 1906 Act is squarely inconsistent with the high trust duties that this Nation has assumed toward dependent Indian tribes.

CONCLUSION

In every era of this Nation's history this Court has held strong against assertions of implied abrogations of

[19]The United States paid the Tribe $537,007.20 for the ceded lands in 1906. The Indian Claims Commission found this amount to be unconscionable and awarded the Tribe an additional $4,152,992.80 (J.A., Stip. 19).

important Indian rights—especially when treaty hunting and fishing rights have been at issue—and that historic institutional function should govern here. The State's argument for abrogation is simply too fragile: no language in the 1906 Act, or even in its history, suggested an abrogation; the purpose of the Act, to settle a boundary dispute, could be fully accomplished without an abrogation of hunting and fishing rights; Article IV of the 1906 Act expressly preserved tribal rights not inconsistent with the Act; and the Tribe was never compensated for the loss of such rights. This is the kind of situation, like *Winans* and *Menominee Tribe,* where the moral principles infused into the canons of construction should control: Indian treaty rights should not be obliterated unless the opposing party can marshall the fair weight of evidence to prove Congress' clear intention to abrogate. The State's case falls far short of the standards this Court requires.

Accordingly, the decision below should be affirmed.

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No. 83-2148

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et.al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The Tribe's argument to this Court is fundamentally flawed. It ignores or attaches no significance to the critical analytical factors that must be considered in a proper resolution of this case.

The ultimate issue in this case is whether the State Department of Fish and Wildlife (the State) has the authority to regulate Klamath Tribe members' fishing, hunting and trapping on approximately 970 square miles of land formerly part of the Klamath Indian Reservation (*i.e.* the ceded lands). The correct analysis of this case compels the conclusion that the State can regulate wildlife gathering on the ceded lands because: (1) the 1906 Cession Act diminished the reservation boundaries; (2) the rights exclusively to fish, hunt and trap were limited in the 1864 Treaty to lands within the reservation; and (3) the Cession Act contained no language restoring these rights to the Tribe on the ceded land.

The respondent Tribe ignores or dismisses as irrelevant the above factors. The Tribe urges upon this Court a wholly different analysis for resolving the ultimate issue. The approach employed by the Tribe and the Ninth Circuit in this case mistakenly focuses on whether retention of fishing, hunting and trapping rights is inconsistent with the purposes of the Cession Act and the subsequent uses of the ceded land and whether Congress manifested a clear intent to take away these rights on the ceded land. The Tribe contends that its analysis is founded upon Article IV of the Cession Act and

decisions of this and other courts. Neither Article IV nor the decisions cited, however, support the proferred analysis.

The Tribe's reliance on Article IV of the 1906 Cession Act is based upon the Tribe's substitution of the term "purposes" for the term "provisions," contained in Article IV. Article IV impliedly referred back to the 1864 Treaty and provided that "nothing in this agreement shall be construed to deprive" the Tribe "of any benefits to which they are entitled under existing treaties, not inconsistent with the *provisions* of this agreement." 34 Stat. 366 (Pet. for Cert., App. D) (emphasis added). Contrary to the Tribe's assertions and contrary to the Ninth Circuit's interpretation, Article IV did not preserve all treaty rights not inconsistent with the purposes of the Cession Act or the subsequent uses of the ceded land. It merely reserved to the Klamath those treaty rights that were not inconsistent with the provisions of the 1906 Act. The clear import of Article IV, therefore, was to leave intact the Tribe's remaining rights under the 1864 Treaty within the reservation as it existed following the 1906 Act. Hence, the assertion that Article IV preserved the Tribe's right to regulate fishing, hunting and gathering on the ceded lands because exercise of these rights is consistent with the *purposes* of the 1906 Act and the subsequent *status* of the lands ceded, is not based upon the actual language of Article IV.

The cases and treaties cited by the Tribe (*e.g.*, Tribe's Br. at 19, 22) are inapposite because they involve fact situations not present in the instant case. The legal authorities mistakenly relied upon fall into one of the following three categories: (1) Litigation in which the original treaty expressly reserved or was construed as reserving off-reservation fishing and hunting rights. *E.g.*, *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); *State v. Tinno*, 94 Id. 759, 497 P.2d 1386 (1972). (2) Disputes in which the cession agreement or other act expressly reserved fishing and hunting rights on the ceded land. *E.g.*, *Antoine v. Washington*, 420 U.S. 194 (1975); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 53 (1983); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). (3) Matters in which the cession agreement did not effect a diminishment of reservation boundaries. *E.g.*, *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 707 (1984).

None of these three situations is presented here: (1) the 1864 Treaty did not reserve off-reservation fishing and hunting rights; (2) the Cession Act did not expressly reserve fishing, hunting and trapping rights on the ceded land; and (3) the Cession Act here *did* effect a diminishment of the reservation boundaries. The cited cases, thus, do not support directly or by implication the argument that on-reservation treaty rights continue on lands ceded in a diminishment of reservation boundaries when the cession act has not expressly reserved treaty rights on the ceded land.[1]

[1] To the extent that the cases and treaties are advanced to substantiate the proposition that the right to hunt free of state regulation does not depend upon a possessory interest in the underlying land, they clearly are not on point. The State does not assert that the two interests are ineluctably joined. The State contends solely that given the facts in this case, the Tribe did not retain the regulatory right it asserts. In any event, the Ninth Circuit,

(Footnote continued on next page)

This Court has not ruled expressly on the precise issue presented, but both sides rely on its decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Tribe asserts that "*Rosebud* establishes that the question of diminishment is separate from the question of whether, notwithstanding diminishment, any beneficial interest has been retained" in ceded lands. (Tribe's Br. at 27). However, the "beneficial interest" to which this Court referred in footnote 24 of its opinion is the beneficial interest that a tribe may retain following a cession act until the tribe receives payment for the ceded land. *See Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 101-02 (8th Cir. 1975) (citing *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920)). In *Rosebud*, the cession agreement provided for payment to the tribe as the ceded lands were sold. Until sold, the tribe retained a beneficial interest in the land. In the present case, the Tribe has been paid for the ceded land and, therefore, retains no beneficial interest in the land.

In the absence of controlling authority from this Court, the parties have looked to the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161, *cert. denied*, 449 U.S. 584 (1980). The Tribe misreads *Red Lake Band*, when it asserts that the right at issue

(Footnote continued from previous page)

held, relying on this Court's ruling in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), that the Tribe's right to hunt and trap on its reservation land was premised on its treaty right to hold the reservation land as a home. *Kimball v. Callahan*, 493 F.2d 564, 565 (9th Cir.) *cert. denied*, 419 U.S. 1019 (1974). It logically follows that if those lands are no longer used as a home for the Tribe because they are sold to the United States and no longer part of the reservation, the derivative right to hunt and trap falls with its source, the right to occupy the lands as a home.

was a right to hunt "over the objection of the landowner on land which has been opened for settlement," whereas the right asserted here is to "hunt and fish free of state regulation on national forest lands or private forest lands with the consent of the landowners." (Tribe's Br. at 25-26.) As the Eighth Circuit's decision in *Red Lake Band* makes clear, state regulation was the issue:

> The Band seeks now to free its members of the *state's control*, by contending that its grant of rights, title and interest in the land to the United States did not include hunting, fishing, trapping and wild rice gathering rights. We disagree.
>
> . . . We agree with the district court's conclusion that the Red Lake Band gave up its rights to hunt, fish, trap and gather wild rice *free of the state's regulation of such activities*. . . .

614 F.2d at 1162 (emphasis added).

The Tribe also asserts that the Eighth Circuit in *Lower Brule Sioux Tribe v. State of South Dakota*, *supra*, distinguished *Red Lake Band* on the basis that the "right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself," and on this ground affirmed the tribal right to fish and hunt on land taken by the federal government for water projects. (Tribe's Br. at 24). It is true that the Eighth Circuit distinguished *Red Lake Band* from *Lower Brule*, but it did not draw the distinction the Tribe posits. The Tribe's quotation from the *Lower Brule* opinion at pages 24-25 of its brief omits the critical portion of the quote and opinion. The sole basis on which the Eighth Circuit distinguished the two cases was that the cession act in *Red*

Lake Band diminished the reservation, whereas the acts construed in *Lower Brule* did not. (*See* the State's opening brief at pages 26-27). The Eighth Circuit in *Lower Brule* emphasized that when a cession act does not diminish the reservation, use of language in the act "referring to the 'entire interest' or 'all claims' in certain land falls short of stating a clear purpose to abrogate specific treaty rights." 711 F.2d at 822-23.

It was in the context of a *non-diminishment* case, therefore, that the Eighth Circuit stated that "treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation." 711 F.2d at 823 (footnote omitted) (emphasis in original). Had the acts in *Lower Brule* diminished the reservation, the Eighth Circuit appropriately would have held, consistent with its earlier *Red Lake Band* decision, that the Lower Brule's treaty-reserved fishing and hunting rights were lost on the ceded lands. In misreading *Lower Brule* and in misanalyzing the present case, the Tribe glosses over the critically important fact of diminishment of reservation boundaries and the role diminishment plays in analyzing a question of retention of treaty-reserved fishing and hunting rights on ceded land.

CONCLUSION

The on-reservation nature of the treaty rights and the subsequent diminishment of reservation boundaries are critical factors in the analysis and resolution of the issue in this case. The lower court improperly disregarded these factors. It erroneously focused on the issue whether retention of

treaty rights on the ceded, off-reservation land is inconsistent with the purposes of the 1906 Act and the subsequent uses of the ceded land. (*See* Pet. for Cert. at App-6 - App-7). The Tribe's argument similarly ignores these factors as well as the terms of the 1906 Cession Act by which they conveyed all their interest and relinquished all claims and demands arising out of the ceded land.

In 1906 the Klamath and other tribes made a bargain with the federal government. No justification for allowing the Tribe to avoid the clear legal consequences of that bargain has been advanced. The Tribe was represented in the negotiations by articulate, intelligent, English-speaking tribesmen. Indian Agent McLaughlin explained the cession agreement to the Tribe, and the Tribe was represented by counsel. (*See* State's Br. at 43-44, n. 12). Under these circumstances, the conclusion is inescapable that the Tribe relinquished its exclusive fishing, hunting and trapping rights on the ceded land, and that its rights are subject to state regulation. The contrary decision of the Ninth Circuit Court of Appeals should be reversed.

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